

NONLAWYER ASSISTANCE TO INDIVIDUALS IN FEDERAL MASS JUSTICE AGENCIES: THE NEED FOR IMPROVED GUIDELINES

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V. FEDERAL MASS JUSTICE AGENCY AUTHORIZATION FOR INCREASED NONLAWYER PROFESSIONAL ASSISTANCE CAN BE ACCOMPLISHED IN A MANNER THAT IS CONSISTENT WITH AGENCY NEEDS TO REGULATE COMPETENCE AND ETHICAL CONDUCT OF PRACTITIONERS	133
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INTRODUCTION

This Article is a study of nonlawyer assistance to individuals in so-called "mass justice" agencies — that is, federal agencies which have a high volume of individual and family claims, applications, or disputes. The purpose of the study was to make findings and recommendations¹ with respect to those agencies on the following matters. First, to what extent are individuals not assisted or represented by anyone (exclusive of agency personnel) and what are the resulting ramifications for efficient and fair agency processes? Second, to what extent are individuals assisted or represented by nonlawyers and to what extent are they represented by lawyers; what are the skills, training, and experience each group is required by agency rules to possess; what are the functions each group performs; and what are the differing results, if any? Third, to what extent do agency rules encourage or discourage nonlawyer assistance and representation and what are the justifications for such rules? Fourth, to what extent do federal and state laws or professional codes of ethics encourage or discourage nonlawyer assistance and representation to those involved in federal agency proceedings, and what is the underlying rationale for these laws and rules?

Two mass justice agencies were selected for intensive study: the Social Security Administration (SSA) and the Immigration and Naturalization Service (INS). In addition, relevant procedures of the Veterans' Administration (VA) and the Internal Revenue Service (IRS) were compared.² Interviews of participants in the proceedings of the selected

1. This Article was initially written in 1986 as a report to the Administrative Conference of the United States (ACUS). The Conference's Committee on Regulation reviewed the report and developed recommendations for presentation to the entire Conference. The recommendations were subsequently adopted by the Conference at its 33d plenary session on June 19, 1986. The ACUS recommendations are reprinted *infra* note 172.

2. Although the focus of this study is mass justice agencies, reference has also been made as appropriate to existing literature on nonlawyer assistance in non-mass justice

federal agencies were largely conducted in the 10-month period between May 1, 1985, and February 28, 1986. These included interviews of federal agency officials as well as interviews with a number of private, nonprofit legal aid and social services agencies which, directly or indirectly, provide lawyer and nonlawyer professional assistance in mass justice agency proceedings.³

A considerable amount of material bearing on the subject of this study has been published in the past. This study has collated and drawn extensively upon those past investigations. Of particular importance was the survey of federal agencies published in February 1985 by the American Bar Association's (ABA) Standing Committee on Lawyers' Responsibility for Client Protection and the American Bar Association Center for Professional Responsibility.

The present study resulted in several findings and conclusions. A large number of individuals involved in federal mass justice agency proceedings have certain unmet needs for assistance at all levels of agency process. Particularly needed is assistance with filling out forms and attending informal interviews and conferences prior to commencement of any formal proceeding. A high volume of agency decisions affecting ordinary citizens is made at these early nonadversarial stages. From an agency point of view, persons who are unassisted at the early stages are more likely than not to cause a loss of agency efficiency. Legal aid programs have provided significant help to many low income persons. They have also often helped bring about important legal reforms. However, the existing pool of lawyers is inadequate to meet either all the needs of low and moderate income persons for assistance in the early

agency proceedings. See Rose, *Representation by Nonlawyers in Federal Administration Agency Proceedings: An Expanded Role* (Apr. 9, 1984) (unpublished study on economic regulatory proceedings submitted to the Administrative Conference of the United States).

3. Interviews were conducted with legal staff and with a cross section of nonlawyer professional staff of the following private nonprofit organizations operating in Washington, D.C.: AYUDA; Alien Rights Project, Washington Lawyers' Committee; Migrant Legal Action Project; Legal Counsel for the Elderly Department, American Association of Retired Persons; National Senior Citizens Law Center; National Council for Senior Citizens; George Washington Law School clinics; Neighborhood Legal Services Program; Legal Aid Society; Family and Child Services; Antioch Law School clinics on paralegal advocacy, government benefits, and immigration matters; Women's Legal Defense Fund; District of Columbia Citizens Complaint Center; National Paralegal Association (volunteer program); Pro Bono Coordinator's Office, District of Columbia Bar; Lawyer Referral and Information Service, District of Columbia Bar; Public Citizen; Disabled American Veterans; and American University Law School clinic on veterans laws. [hereinafter *Survey of Private Nonprofit Organizations*]. Assistance in collecting statistical and other agency data and in interviewing participants in federal agency proceedings was provided by Majel Stein, J.D., University of Virginia.

stages or all their needs for representation at later stages. The absence of adequate resources for assistance and representation is particularly acute for working poor and moderate income persons who ordinarily do not qualify for free assistance from legal aid organizations, and who are frequently unable to afford the prevailing market fees of lawyers.

Statistical evidence indicates that in agency hearings unrepresented persons are less likely to obtain favorable decisions than those who are represented. Individuals in mass justice agency hearings who are represented by nonlawyers achieve results only slightly less favorable than those achieved by individuals who are represented by lawyers, and achieve significantly more favorable results than those individuals who are completely unrepresented. This evidence, together with subjective opinion evidence that in mass justice agency proceedings nonlawyers generally perform the same functions at many levels of the agency process as lawyers, and perform them well, leads to the conclusion that nonlawyer professionals as a class are able to provide competent assistance to individuals at many levels of mass justice agency proceedings. Because of nonlawyer competency, and because of the inadequate supply of lawyers to assist low and moderate income persons, mass justice agencies should encourage increased assistance by nonlawyer professionals.

Federal mass justice agency regulations and practices do not entirely prohibit nonlawyer assistance, but neither do they encourage nonlawyer assistance as much as they could. Such encouragement needs to be consistent, of course, with legitimate agency interests in regulating the qualifications and ethical conduct of agency practitioners. In some agencies, nonlawyer assistance is encouraged only when it is provided free of charge (usually to relatives, friends, or poor persons). These agencies fail to maximize the potential for increased nonlawyer professional assistance to working poor and moderate income persons who can afford to pay modest fees because the agencies fail to provide nonlawyer professionals as a class with adequate protection from prosecution under state unauthorized practice laws. State unauthorized practice laws, and the fear of prosecution under those laws, were found to be chilling deterrents to the development of an increased pool of nonlawyer professionals to assist moderate income individuals involved in federal mass justice agency proceedings.

The problem is even more acute on the state level where unauthorized practice laws frequently serve as outright bars to nonlawyer assistance before state administrative agencies. The state level problem, however, is beyond the scope of this Article.

While nonlawyer professionals who provide assistance for a fee in

federal agency proceedings are adequately protected against state prosecution for unauthorized practice under the regulations of some agencies (the Internal Revenue Service, for example), they are not protected at all under other agency regulations (for example, those of the Immigration and Naturalization Service). In addition, even when agency regulations permit nonlawyer practice for a fee (as do those of the Social Security Administration), the long history of unauthorized practice enforcement in the states, and the uncertainty about the federal government's policy towards that enforcement, has acted as a practical deterrent to the development of nonlawyer professional practice.

Under the federal preemption doctrine articulated by the Supreme Court in *Sperry v. Florida ex rel. Florida Bar*,⁴ nonlawyers can be protected from prosecution under state unauthorized practice laws for their federal agency practice activity, but only if agency regulations unambiguously authorize the activity to be carried on in the respective states. This federal preemptive protection is particularly needed for those nonlawyer professionals who are, or might be, willing to provide assistance for a fee to moderate income persons.

Individual mass justice agencies probably have implied authority to issue regulations authorizing increased nonlawyer representation. Even if they do not have implied authority, it is probable that section 555(b) of the Administrative Procedure Act (APA)⁵ provides sufficient legislative authority for agencies to authorize increased nonlawyer representation. Given the uncertainty and fears about the enforcement of state unauthorized practice laws, however, and the fact that section 555(b) is not, on its face, crystal clear, it may also be useful to amend the language of section 555(b) to emphasize that nonlawyer agency practice is authorized under the Administrative Procedure Act. It may also be helpful to amend section 555(b) to make it unambiguously clear that

4. 373 U.S. 379 (1963).

5. 5 U.S.C. § 555(b) (1982) provides that:

(b) A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. A party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding. So far as the orderly conduct of public business permits, an interested person may appear before an agency or its responsible employees for the presentation, adjustment, or determination of an issue, request, or controversy in a proceeding, whether interlocutory, summary, or otherwise, or in connection with an agency function. With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it. This subsection does not grant or deny a person who is not a lawyer the right to appear for or represent others before an agency or in an agency proceeding.

those nonlawyers who are admitted to practice by an agency are authorized to do all that is necessary and incidental to that practice in their respective states.

Federal mass justice agencies currently utilize a range of admission criteria and other measures to ensure that individual nonlawyer practitioners meet agency standards of competence at various stages of agency process, according to the particular objectives and needs of the respective agencies. These mechanisms are generally workable and should be left, as they now are, to individual agency determination according to each agency's own particular objectives and needs. Agencies should be urged, however, to review their regulations governing competence toward the goal of increasing the pool of nonlawyer representatives who can competently provide assistance at all levels of agency proceedings where nonlawyer assistance is determined by an agency to be feasible.

Agencies should review their rules of practice that deal with attorney misconduct, such as negligence, fee gouging, fraud, misrepresentation, and representation when there is a conflict of interest, to ensure that similar rules are made applicable to nonlawyers. In addition, agencies should ensure that effective agency procedures are established for adequate enforcement of those rules of practice, including agency procedures for receiving complaints from the public.

I. LARGE NUMBERS OF INDIVIDUALS INVOLVED IN FEDERAL MASS JUSTICE AGENCY PROCEEDINGS HAVE UNMET NEEDS FOR ASSISTANCE

The principal engagement between an ordinary citizen and a federal agency concerning a claim, application, or dispute is most likely to occur in a mass justice agency. From the viewpoint of the ordinary citizen or resident seeking disability or retirement benefits, an adjustment of alien status to citizenship, or a refund of taxes, each mass justice agency decision affecting his claim or dispute is of great personal importance. Furthermore, from the individual's point of view, assistance from knowledgeable sources in presenting the claim or application, or pressing the individual's side of the dispute, may also be of great importance. In fact, there is statistical evidence showing that represented individuals in mass justice agency proceedings are more likely to prevail than unrepresented individuals.⁶

6. One statistical study concluded that represented individuals are more likely to prevail than unrepresented ones in informal nonadversarial proceedings of agencies dispensing disability benefits, and also discussed some of the costs and benefits of provid-

At the same time, from the viewpoint of government policymakers, the federal mass justice agency decisional system is overloaded. For example, the Social Security Administration in fiscal year 1983 experienced a 13% caseload increase over fiscal year 1982 at all levels of hearings and appeals, resulting in a total of 362,223 requests for hearings. Nonlitigated applications for Social Security benefits have also steadily increased, resulting in several hundred thousand new benefi-

ing that representation. See Popkin, *The Effect of Representation in Nonadversary Proceedings — A Study of Three Disability Programs*, 62 CORNELL L. REV. 989 (1977) (finding that in Federal Employees' Compensation Act proceedings, represented claimants had advantage of up to 28% at hearing stage). More recent statistical data compiled by the Social Security Administration reveals that in fiscal year 1983, unrepresented persons prevailed in 14.4% fewer requests for hearing matters than those who were represented. *Participant Involvement in Request for Hearing Cases for Fiscal Year 1983* (unpublished survey of the Office of Hearing Appeals, Social Security Administration May 1984). Veterans' Administration data also reveal that unrepresented persons are slightly less likely to prevail before the Board of Veterans' Appeals than those represented by attorneys or nonprofit service organizations. These organizations prevail in 3% (attorneys) to 1.5% (nonprofit organizations) more matters. See *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 327 (1985) (citing Veterans' Administration statistics). Success rates before the Veterans' Board of Appeals by any category of representative are significantly lower than those before review boards of other agencies, ranging only between 15% and 18%. By statute, there is no judicial review of Veterans' Board decisions. 38 U.S.C. § 211(a) (1982).

No person may charge veterans a fee of more than \$10 in disability benefit proceedings. 38 U.S.C. § 3404(C) (1982). The case of *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985), involved a challenge to the \$10 fee cap on the ground that the cap effectively precluded the availability of lawyers to provide representation and was, therefore, unconstitutional. The Court upheld the fee limitation because it found that the record did not demonstrate that veterans were harmed by nonlawyer representation in administrative agency proceedings before the Veterans' Administration. *Id.* at 328-29. Justice Stevens dissented and argued that whether or not lawyers would be more successful in those proceedings, the fee limitation interfered with the free choice of representative, and that this interference was both harmful and an unconstitutional infringement of individual liberty. *Id.* at 370-72 (Stevens, J., dissenting).

The Immigration and Naturalization Service does not maintain records concerning representation in INS proceedings. Knowledgeable persons in nonprofit agencies serving aliens stated that it was their experience that represented persons prevailed more often than those who were unrepresented. *Survey of Private Nonprofit Organizations*, *supra* note 3.

Unrepresented litigants are also less likely to prevail in judicial proceedings. A study of 87 conventional civil actions filed by indigents in the United States District Court for the District of Columbia between 1960 and 1964 showed that those indigent civil plaintiffs who represented themselves were twice as unlikely as indigents represented by others to survive a motion to dismiss on the pleadings and almost nine times less likely to achieve a settlement. Moreover, these *pro se* plaintiffs had no chance of obtaining discovery and were not among the four plaintiffs who reached a trial on the merits. Schertz, *The Indigent Civil Plaintiff in the District of Columbia: Facts and Commentary*, 27 FED. B.J. 235, 241-43 (1967); accord Johnson, *Thrown to the Lions: A Plea for a Constitutional Right to Counsel for Low-Income Civil Litigants*, 4 B. LEADER 17 (ABA 1978) (discussing four-city study finding that civil defendants represented by counsel were almost six times more likely to succeed than unrepresented defendants).

ciaries added to the rolls, bringing the total beneficiaries from 35.6 million in 1982 to an estimated 36.3 million in 1984.⁷ Similarly, the Veterans' Administration decides approximately 800,000 claims per year for service-connected disability benefits and pension claims, and approximately 66,000 of the claims which are denied are contested in administrative proceedings.⁸ The 1983 Annual Report of the Attorney General states that 223,000 petitions for adjustment of alien status were considered, and that the Immigration and Naturalization Service reported an annual caseload of 90,000 litigated matters from administrative reviews through the federal court system.⁹

In some areas — disability claims, for example — the facts may change many times, thus necessitating new claims and reviews for each change in circumstance.¹⁰ Moreover, changes in executive agency regulations or interpretations of federal law may also result in many new disputes. For example, the Reagan Administration's administration of disability benefits rules resulted in a large increase in agency appeals and subsequent court litigation. In 1983 alone, federal court litigation of SSA cases increased by 97% over the previous year, as 23,690 new cases were filed. Disability cases accounted for 98% of the new litigation.¹¹

Given the size of mass justice agency caseloads, and the widely varying factual circumstances presented in the cases, it is, of course, exceedingly difficult for agencies to reach uniformly accurate and fair decisions at all stages. Errors inevitably occur, often requiring under our present system not only administrative corrections, amendments, and appeals, but also judicial review.

Sources of knowledgeable assistance for individuals involved in mass justice agency proceedings can make the correction process more efficient and fairer for both individuals and agencies. In this connection, it should be noted that individuals dealing with federal mass justice agencies need help both at the very early, nonadversarial stages of agency process when information is collected, forms are filled out, and questions answered, and also at subsequent more formal hearing and adver-

7. 1984 SOCIAL SEC. ADMIN. ANN. REP. TO CONG. 15, 33, 48-49.

8. See *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 309 (1985) (citing data from 1978 report of Legal Services Corporation and noting that figures remain fairly constant from year to year).

9. 1983 ATT'Y GEN. ANN. REP. 157.

10. See Dixon, *The Welfare State and Mass Justice: A Warning from the Social Security Disability Program*, 1972 DUKE L.J. 681 (1972) (providing a critical view of multiple review and "astronomical" caseloads in Social Security disability proceedings).

11. 1984 SOCIAL SEC. ADMIN. ANN. REP. TO CONG. 15, 48-49.

sarial stages. In fact, it was the consensus of those interviewed¹² that the greatest volume of need is in the early stages, well before there is any requirement for formal appearance of counsel or representative. There was also general agreement that if an individual presenting a claim or application has competent assistance at the outset, even before forms are submitted, the amount of agency time required to consider it can be reduced considerably. Ascertaining and resolving factual issues is the major part of a mass justice agency's workload, and when the individual has the benefit of knowledgeable assistance in presenting the facts clearly and in a format that is familiar to the agency, the administrative process is accelerated and the decisionmaker is aided in reaching a correct decision. A clearer record is also established for any administrative review that does ensue, thus making it easier for the administrative reviewer to quickly determine the correctness of the initial decision.

Almost 25 years ago, Allanson Willcox, General Counsel of what was then the Department of Health, Education and Welfare, acknowledged the efficacy of legal representation in the administrative process when he addressed the 1963 annual meeting of the Virginia State Bar Association:

The fact that a citizen can retain [a lawyer] to represent him goes a long way towards assuring that he will receive the treatment to which he is entitled at the hands of a government agency. . . . I say this despite my conviction that the officials who administer local, state and federal programs would stand toward the top in competence and dedication to duty. But no one would deny that administrative agencies can and do make mistakes; as with any group, no official is infallible, and some are more fallible than others. And not infrequently a lawyer can bring out facts or considerations that the administrator with the best will in the world would otherwise overlook.

General Counsel Willcox's comments focused on the help that lawyers can and do give their clients. Today, there is serious debate in many quarters over the question of whether lawyers are the only professionals who can provide competent assistance or representation in administrative proceedings generally.¹³ There is also continuing debate

12. *Survey of Private Nonprofit Organizations*, *supra* note 3.

13. Lay advocates who counsel and assist citizens with their administrative problems have been used with considerable success in other countries. Notable examples are the 750 Citizens Advice Bureaus widely used in Great Britain. These neighborhood offices handle some three million requests for information and advice per year and are providing an increasing amount of nonlawyer representation in administrative appeal proceedings. See Sloviter, *Let's Look at Citizens Advice Bureaux*, 65 A.B.A. J. 567 (1979) (discussing impact of Citizens Advice Bureaux in Great Britain); Zucker, *Citizen's Advice Bureaux* (Nov. 12, 1964) (paper presented at the Conference on the Extension of Legal Services to the Poor, Department of Health, Education and Wel-

over the question of whether the traditional adversarial methods employed by lawyers are the only methods for resolving disputes, either in administrative or judicial settings.¹⁴

It is not necessary to discuss here the pros and cons of these relatively global topics. It is sufficient to focus in this Article on the fact that lawyers, even if they are to be preferred in administrative agency proceedings, are not available in adequate numbers to meet all the needs for individual assistance in mass justice agencies. As we shall see, there are large gaps in representation even at the hearing and adversarial stages of mass justice agency review, and there was uniform agreement among agency participants interviewed that the gaps are

fare, Washington, D.C.) (noting success of Citizens Advice Bureaus). Comparable examples can be found scattered throughout this country. The Women's Legal Defense Fund in Washington, D.C., for example, employs nonlawyers to provide assistance and representation before administrative, prosecutorial, and judicial branches of the District of Columbia government in cases involving battered women. 1984 WOMEN'S LEGAL DEFENSE FUND ANN. REP. 1. Many commentators have urged an increased use of nonlawyer professionals to provide assistance both to citizens who have administrative agency problems and also to those who have non-administrative-agency disputes, such as those ending up in small claims courts. See, e.g., Sparer, Thorkelson & Weiss, *The Lay Advocate*, 43 U. DET. L. REV. 493 (1966) (discussing need for centers for lay advocacy); Zander, *LEGAL SERVICES FOR THE COMMUNITY* (1978); Bellow, *Legal Services to the Poor: An American Report*, reprinted in *ACCESS TO JUSTICE AND THE WELFARE STATE* 49 (M. Capeletti ed. 1981) (criticizing "success" of United States' legal aid system); Statsky, *Paralegal Advocacy Before Administrative Agencies: A Training Format*, 4 U. TOL. L. REV. 439 (1973) (concluding that nonlawyers should be trained through role playing and clinical education).

14. The need to explore differing methods of resolving legal disputes as an alternative to traditional adversarial methods has been a matter of well-publicized discussion in recent years. See generally S. GOLDBERG, E. GREEN & F. SANDER, *DISPUTE RESOLUTION* (1985) (discussing alternatives to traditional means of dispute resolution); *A Colloquium on Improving Dispute Resolution: Options for the Federal Government*, 1 ADMIN. L.J. 399 (1987). The American Bar Association and several court systems, including the District of Columbia, are currently fostering experiments with mediation, voluntary and mandatory arbitration, and other nonadversarial programs, some of them as part of an ABA-funded pilot "multidoor courthouse" program. See Edelman, *Institutionalizing Dispute Resolution Alternatives*, 9 JUST. SYS. J. 134 (1984) (discussing need for institutionalization of alternative dispute resolution initiatives). The Administrative Conference of the United States adopted a recommendation in 1982 urging federal agencies to undertake experiments with mediation techniques in rulemaking procedures. Administrative Conference Recommendation No. 82-4, *Procedures for Negotiating Proposed Regulations*, 1 C.F.R. § 305.82-4 (1987). As a result, several federal agencies, including the Environmental Protection Agency and the Federal Trade Commission, have done so. See Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1 (1982) (proposing negotiation process which allows affected parties and agency to participate in rulemaking).

According to experts in the field of alternative dispute resolution, trained nonlawyer professionals are an integral part of the current development of nonadversarial alternatives. Interview with Michael Lewis, Deputy Director, National Institute for Dispute Resolution; Interview with Linda Singer, Executive Director, District of Columbia Center for Community Justice.

even larger at the more informal application and consultation stages. This does not necessarily reflect an inadequate supply of lawyers in the country. It does reflect an inadequate supply of lawyers under our current legal service delivery systems to provide the assistance that poor and moderate income persons can afford for their everyday mass justice agency claims and applications.¹⁵

Legal services in the administrative agency field have historically been available to those who could afford to pay for them. Those seeking a television license or an airline route, for example, have been heavy users of available legal resources. For many years, little attention was paid to the fact that low and moderate income persons were developing increased contacts with federal and state administrative agencies and needed assistance. In the mid-1960's, attention was focused on this phenomenon and particularly on the impact of administrative decisions on the poor. Professor Edward Sparer, the director of a legal services program and a leader in the movement to provide free legal aid to the poor, wrote in 1964 that: "No longer is the primary contact of the poor man with the law in the ordinary courtroom (criminal or otherwise) but in the anteroom of a city, state or federal agency as he awaits a determination of vital significance to him and his family."¹⁶

With increased national attention on the needs of the poor in the mid-1960's, new efforts were made both by government and by private social welfare agencies to provide legal aid and paralegal assistance to those who were at the bottom of the economic scale. Neighborhood legal aid programs, with monies provided by the federal Legal Services Corporation, were established in every state. However, as Derek Bok, President of Harvard University, has pointed out: "Even in its palmiest days, the Corporation was only empowered to help the poor and had money enough to address but a small fraction of the claims of even this limited constituency."¹⁷ Other studies, and this author's interviews with

15. Former President Carter characterized the distribution of legal services in the nation with the much publicized statement that "[w]e are overlawyered but under-represented." Address by President Carter, Los Angeles County Bar Association Centennial Celebration (1978).

16. Sparer, *The New Public Law: The Relation of State Administration to the Legal Problems of the Poor* (Nov. 12, 1964) (paper presented at the Conference on the Extension of Legal Services to the Poor sponsored by the Department of Health, Education and Welfare, Washington, D.C.); see also Reich, *The New Property*, 73 YALE L.J. 733 (1964) (discussing need for individual protection against government largess); Hostetler, *Poverty and the Law*, reprinted in *POVERTY AS A PUBLIC ISSUE* (Seligman ed. 1965).

17. Bok, *Law and Its Discontents: A Critical Look at Our Legal System*, 38 RECORD OF THE ASS'N OF THE BAR OF THE CITY OF NEW YORK, No. 1, at 12, 18 (1983) (37th Annual Cardozo Lecture). The Legal Services Corporation estimated in 1978

legal aid groups, confirm that legal assistance organizations serving the very poorest cannot meet all the requests for help and must frequently close their doors for intake of new cases, sometimes for months at a time.¹⁸

At the same time, the legal needs of the working poor and moderate income groups have never been met by federally funded legal aid programs, and they continue to be largely ignored by federal and state policymakers. There are, however, some evolving experiments in the private sector with prepaid legal services and high volume clinics. As Harvard President Bok observed regarding the millions of people with modest incomes, "the cost of legal services grows much faster than the cost of living . . . [and] [i]n practice most people find their legal rights severely compromised by the cost of legal services . . ."¹⁹ In 1986 the president of the American Bar Association wrote that "many middle-income Americans . . . find themselves unable to assert their legal rights because they cannot afford to do so. According to some estimates, as many as 100 million Americans find themselves in this position."²⁰ The high cost of lawyers is a factor frequently cited in public opinion polls as to why citizens do not make greater use of lawyers, and complaints about excessive fees comprise the largest single category of client complaints against lawyers lodged with bar disciplinary entities.²¹

As a result of the high cost of legal assistance, many of those who are neither very poor, and thus eligible for federally subsidized legal aid, nor very affluent, and thus in a financial position to purchase lawyers' services at prevailing market rates, do without legal assistance for many kinds of legal problems, including problems with administrative agencies. The American Bar Foundation conducted a survey of over 2,000 families in the mid-1970's to assess the personal, nonbusiness problems encountered by the public and their use of lawyers' services to address these problems. The survey revealed that overall less than one

that, nationally, no more than one out of seven persons qualifying under the Corporation's income standard for free legal assistance was in fact assisted by federally funded legal service programs. *THE LEGAL SERVICES CORPORATION AND THE ACTIVITIES OF ITS GRANTEEES: A FACT BOOK* (Legal Services Corporation Spring 1979). The cuts in federal funding for the Corporation since 1978 have reduced legal aid office budgets by 25% and thus exacerbated the problem of inadequate resources for indigents.

18. *REPORT OF THE COMMITTEE ON CIVIL LEGAL SERVICES OF THE JUDICIAL CONFERENCE OF THE DISTRICT OF COLUMBIA 13* (1980) [hereinafter *DISTRICT OF COLUMBIA JUDICIAL CONFERENCE REPORT*]; Interview with Ann Barker, Director of Public Service Activities, District of Columbia Bar.

19. Bok, *supra* note 17, at 13.

20. Falsgraf, *Access to Justice in 1986*, 72 A.B.A. J. 8 (1986).

21. Interview with Thomas H. Henderson, Jr., Deputy Bar Counsel, Board on Professional Responsibility, District of Columbia Bar.

out of two persons who reported having had a "serious personal (non-business) difficulty with a government agency" had consulted a lawyer. The survey revealed that lower income persons were even less likely to consult a lawyer, and that over 50% of all income groups thought that lawyers charged more for their services than they were worth.²²

While the extent of national unmet needs for assistance with legal problems generally, or with administrative problems specifically, cannot be calculated with mathematical precision, there was widespread agreement among persons interviewed for this Article that the studies and estimates of need discussed above are generally accurate and that at least a substantial number of individuals who are involved in mass justice agency proceedings have unmet needs for assistance, particularly at the very early stages where forms need to be filled out and rules explained.²³ In the immigration area, estimates of need ranged between 50% and 80%.²⁴

Similarly, in the Social Security area, there is no hard data on the number of individual applicants for benefits who need, but do not receive, assistance at the early stages of filling out forms and amassing relevant employment, medical, and other documentary evidence. It is known that at the hearing stage, 38% of Social Security claimants were unrepresented in 1983, and that agency statistics indicate that unrepresented claimants are less likely to prevail at that stage than those who

22. THE LEGAL NEEDS OF THE PUBLIC: THE FINAL REPORT OF A NATIONAL SURVEY 115-40, 240-49 (Curran ed. 1977). Interestingly, over 75% of all income groups thought that many things lawyers handle could be done as well and less expensively by nonlawyers.

23. A 1980 study of the District of Columbia court system disclosed an exceptionally high number of unrepresented persons in mass justice court proceedings. For example, the study disclosed that 98% of tenants in landlord-tenant court were unrepresented, and that in divorce, support, and custody cases, at least one party was unrepresented in 85% of the cases. DISTRICT OF COLUMBIA JUDICIAL CONFERENCE REPORT, *supra* note 18.

24. At one time, an information and assistance desk was staffed by local nonprofit agencies, but the INS required it to be moved because of a lack of space. *Survey of Private Nonprofit Organizations* (interviews with staff of AYUDA), *supra* note 3. An example of this is illustrated by a visit in connection with this Article to a local office of the Immigration and Naturalization Service. Over 100 persons, most of whom were non-English speaking, were milling around and trying to find out which of two lines to stand in to obtain or process various INS forms. It took approximately two hours or more to reach the head of the line, at which time one could finally ask whether one was in the correct line. If the individuals mistakenly stood in the wrong line, which was a common occurrence, they would then have to start all over again at the end of the other line. Several families and their children were observed to have been there nearly all day. Only one person in the room appeared to have the assistance of an English-speaking advocate. There was no information or assistance desk provided either by the INS or by a nonprofit agency.

are represented.²⁵

By way of contrast, in the Internal Revenue Service, where federal policy has long encouraged free choice of a representative, including nonlawyers, there is a whole continuum of help available to the public. This help ranges from free assistance to all taxpayers from the IRS itself or to indigents from legal aid agencies, to tax preparation services for middle income groups at modest fees, such as those operated by H & R Block and Sears Roebuck, to the more sophisticated and relatively costly help of enrolled agents, certified public accountants, and general practice lawyers, to the most rarified (and usually most expensive) specialty tax law firms.

Because the Internal Revenue Service model has proven to be a highly successful method for delivering administrative agency assistance across a broad economic spectrum, increasing numbers of administrative agency officials and practitioners have suggested that the potential for increased nonlawyer assistance in mass justice agencies should be explored. Some of the suggestions provided the impetus for this Article's research.²⁶

25. Popkin, *supra* note 6. Some claimants, of course, are capable of representing themselves at hearings (and at earlier stages), and certainly all persons are entitled to do so if they choose. In addition, some unrepresented claimants may have such frivolous appeals that no professional would be willing to provide assistance. Notwithstanding these factors, it is likely that a significant portion of those unrepresented in agency hearings would welcome assistance but are unable to obtain it at an affordable price.

Conversely, in the area of veterans' benefits, there is a long tradition of free service to veterans provided by service organizations such as the American Legion, the Disabled American Veterans, and the American Red Cross. The Veterans' Administration even provides free office space to those organizations. Only 12% of claimants in VA hearings proceed *pro se*, and it is generally assumed that a large portion, if not all of them, prefer to represent themselves. *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 310 (1985); Popkin, *supra* note 6.

26. See 1984 ADMIN. CONF. OF THE U.S. REP. 36 (enumerating comments by several speakers at 29th Plenary Session of Administrative Conference of United States, held on December 6 and 7, 1984, urging Conference to study the issue of nonlawyer representation in administrative procedure generally and in area of mass justice agencies particularly).

Another possible alternative for providing increased assistance to those who are currently unrepresented is for the federal government to encourage an expanded use of lawyers. One way to accomplish this would be for the federal government to increase the budget of the Legal Services Corporation and, in addition, make moderate income persons eligible for its funded services. Another way would be for the federal government to provide additional attorney-fee awards in mass justice agency proceedings in the expectation that this would draw increased numbers of private attorneys. However, neither of these approaches, even if each is desirable, is economically or politically viable at this time in light of the current national efforts to reduce federal budget expenditures. Even though some attorney-fee awards, for example those in Social Security disability cases, can be paid out of amounts due to claimants, rather than out of the public purse (except when attorney-fee awards are made under the Equal Access to Justice Act), there is no pool of money when the claimant is unsuccessful, when the

It has also been suggested that an increased supply of nonlawyer professional assistants will bring down the cost of lawyers' fees.²⁷ Whether or not this prognosis would prove to be true, it does seem likely that alternative sources of lower cost assistance will be utilized by low and moderate income persons who do not currently employ lawyers. A similar result has occurred in various areas, such as divorce cases and will preparation, in the aftermath of Supreme Court decisions allowing lawyer advertising.²⁸

A broadened range of assistance and the right to free choice of assistance at a reasonable price for individuals involved in mass justice agency proceedings are likely to foster improved public perceptions of fair agency procedures. This is particularly likely given the evidence that those who are represented are more likely to prevail in agency proceedings than those who are unrepresented.²⁹

II. NONLAWYER PROFESSIONALS CURRENTLY MEET MANY OF THE NEEDS FOR ASSISTANCE OF INDIVIDUALS INVOLVED IN MASS JUSTICE AGENCY PROCEEDINGS AND AS A CLASS ARE COMPETENT TO DO SO

Results of the investigation for this Article reveal that not all proceedings in mass justice agencies are so difficult or specialized that they require the specially trained skills of a lawyer. To the contrary, they reveal that many early stage proceedings are sufficiently noncomplex and informal that in order to provide competent assistance one need only be intelligent, well-versed in the subject matter and procedures of the agency in question, and experienced in providing assistance to the

government is seeking to recover funds from the client, as in a Social Security overpayment case, or in proceedings not involving money claims such as those in the immigration field.

27. See Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702 (1977) (asserting that lower client costs would occur if limits on unauthorized practice were reduced).

28. Although a Federal Trade Commission study in 1984 attempted to show that lawyers' fees were reduced following *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), and its progeny, the study demonstrated only that lower priced services were available in the communities studied and not that particular lawyers had lowered their fees for their existing services, or that services requiring equivalent expertise and time were being offered for less. The real benefits that appear to have resulted from the Supreme Court's lawyer advertising decisions are: (1) they allowed those lawyers already offering reduced fees (often newly minted law school graduates) to advertise that fact; and (2) they encouraged the development of new legal service delivery systems — that is, high volume, low-cost clinics — to serve low and moderate income persons who before then usually had to choose between high-cost lawyer services and doing without legal assistance.

29. See Popkin, *supra* note 6 (highlighting statistical study concluding represented individuals more likely to prevail than unrepresented individuals in informal nonadversarial proceedings for benefits).

agency's constituency. This investigation further revealed that even in many of the later stages of agency proceedings, including adversarial proceedings, experienced nonlawyers perform competently.

Investigation disclosed that nonlawyers already practice to a modest extent in almost all federal administrative agencies and do so to an even greater extent in all four of the mass justice agencies examined.³⁰ For example, while the Social Security Administration does not maintain statistics on nonlawyer assistance at all levels of agency process, its Office of Hearing Appeals has published data showing that in 1983 nonlawyers entered appearances as sole representatives for Social Security claimants in 11.2% of all requests for hearing matters. In another 1.4% of the matters, nonlawyers appeared jointly with lawyers.³¹

The Immigration and Naturalization Service does not maintain statistics on categories of representatives, but agency officials reported that nonlawyers regularly practice in the agency at all stages, including hearings, and that applicants for adjustment of status are regularly referred by the INS to social service agencies which are staffed primarily by nonlawyers.³² The Veterans' Administration's statistical data show that nonlawyers appear in representative capacities in 86% of all cases involving claims for disability benefits and at all stages of agency review.³³ While the Internal Revenue Service does not maintain statistical data on the category of representatives in its proceedings, it reports that several hundred thousand nonlawyers are entitled to appear before the Service, and that in fact a very large number of nonlawyers, ranging from H & R Block tax preparers to certified public accountants, regularly appear every year. Nonlawyers who pass an examination may also represent taxpayers in the Tax Court.³⁴

30. For a discussion of nonlawyer participation in administrative agencies and mass justice agencies, see the survey conducted by the American Bar Association Standing Committee on Lawyers' Responsibility for Client Protection and the American Bar Association Center for Professional Responsibility (Feb. 1985) [hereinafter 1985 AMERICAN BAR ASSOCIATION REPORT]. Similar findings are set forth in Professor Rose's study for the Administrative Conference, *supra* note 2.

31. *Participant Involvement in Request for Hearing Cases for Fiscal Year 1983*, *supra* note 6.

32. Interview with Yolanda Sanchez, Acting Director, Outreach Program, INS; Interview with J. Hurwitz, Board of Immigration Appeals, INS; 1985 AMERICAN BAR ASSOCIATION REPORT, *supra* note 30.

33. See *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 310 (1985) (enumerating statistics on representation before Veterans' Administration).

34. Rose, *supra* note 2, at 51-54. As of January 31, 1983, there were 28,077 enrolled agents on the roster of the Internal Revenue Service. In addition, certified public accountants, of whom there are some 200,000 belonging to the American Institute of Certified Public Accountants, are entitled to appear before the IRS. Also, an unknown number of persons working for tax preparation services, such as H & R Block and

Investigation also revealed that nonlawyers in the four agencies surveyed appear at all levels of agency proceedings, both adversarial and nonadversarial, and are reported to perform, at each of these levels, the identical functions that lawyers perform.³⁵ Although there was no statistical data available, it was reported that nonlawyers sometimes, but not always, withdraw in favor of lawyers in some representational proceedings, such as deportation cases and tax cases involving charges of criminal fraud, even though agency rules do not require withdrawal.³⁶ Although the mass justice agencies examined do not maintain statistical data on categories of representatives at all levels of agency process, there was uniform agreement by government officials interviewed that the greatest volume of nonlawyer assistance takes place at the early stages. Much of this assistance takes place before a claim or application is filed with an agency.

Nonprofit organizations specializing in assisting low income persons with Social Security claims or immigration problems also stated in interviews that the great majority of their work involved the early nonadjudicative stages of agency practice: assisting persons with preparation of applications and other forms, gathering of supporting materials, explaining agency rules and procedures, and sometimes accompanying them to initial interviews and conferences.³⁷ For example, AYUDA, a legal aid organization in the District of Columbia serving a largely Hispanic population, estimated that 80% of the organization's immigration caseload of some 2,000 cases involved providing assistance with routine applications for adjustment of status (primarily because of a relationship to an United States citizen) and other relatively noncomplex matters such as applications for citizenship or extensions of stay. The agency reported further that this work was currently performed primarily by the agency's nonlawyer staff.³⁸

Similarly, the Legal Counsel for the Elderly Program, a federally

Sears Roebuck, regularly appear before the Service in connection with returns they have prepared. H & R Block maintains 7,672 offices in nearly every town and city in the country.

35. See Rose, *supra* note 2, at 51 (explaining similar findings of performance of identical functions in non-mass justice agency proceedings such as performed in Patent Office).

36. See Rose, *supra* note 2, at 53 (reporting on nonlawyer withdrawal in favor of lawyers); Interview with Yolanda Sanchez, Acting Director, Outreach Program, INS.

37. *Survey of Private Nonprofit Organizations*, *supra* note 3.

38. Interview with Yvonne Vega, Executive Director, AYUDA, Washington, D.C. AYUDA has "recognized" status under INS regulations, and the Outreach Program of INS has described AYUDA as having "a highly qualified staff" which "has an outstanding reputation for relying on the law to assist clients." Letter from Yolanda Sanchez to the District of Columbia Bar Foundation (Mar. 29, 1985).

funded legal assistance program specializing in Social Security and other matters affecting elderly persons, reported that it relies primarily on nonlawyers to visit nursing homes and hospitals, and to assist elderly and disabled clients in filling out application forms for Social Security and other welfare benefits. The director of the program, who is a lawyer, stated that it was his experience that the program's nonlawyers often did a better job than law students (whose work he sometimes reviewed) because the law students were either not as well trained or less inclined to spend long hours going over medical records, interviewing doctors, coworkers, and employers to establish medical disability, and pulling together other essential facts needed to fill out forms properly. He also observed that nonlawyer professionals are frequently better trained, more skillful, and more patient than lawyers in interviewing those clients who are ill, confused, illiterate, or handicapped.³⁹

That there are literally hundreds of thousands of low-level tasks of a nonadjudicative nature in administrative practice is, of course, well known. In 1969, Justice Douglas stated the rationale for permitting nonlawyer assistance at these levels:

[I]t is becoming abundantly clear that more and more of the effort in ferreting out the basis of claims and the agencies responsible for them and in preparing the almost endless paperwork for their prosecution is work for laymen. There are not enough lawyers to manage or supervise all of these affairs; and much of the basic work done requires no special legal talent.⁴⁰

More recently, Justice Rehnquist expressed similar views in the Court's plurality opinion, which upheld the use of nonlawyer assistance to veterans in disability benefit proceedings under a statutory fee limitation of \$10 (that had the practical effect of discouraging legal counsel for fee).⁴¹

Some of the early stages of an administrative proceeding involve informal conferences or interviews, at which time many claims and disputes are resolved. These proceedings were deliberately designed to be informal in order to facilitate easy access to the agency by nonlawyers. Even in adjudications, formal rules of evidence and procedure are largely inapplicable.⁴² In addition, many of the issues resolved by mass justice agencies are commonly thought of either as "noncomplex" or "largely factual" and, therefore, matters that neither require lawyers to

39. Interview with Michael Schuster, Legal Counsel for the Elderly, Washington, D.C.

40. *Johnson v. Avery*, 393 U.S. 483, 491 (1969).

41. *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985).

42. Gellhorn, *Qualifications for Practice Before Boards and Commissions*, 15 U. CIN. L. REV. 196, 200-02 (1941).

present them nor lawyers to adjudicate them. Internal Revenue Service and Veterans' Administration appeals are sometimes said to be in this category.⁴³

The question of what is a complex matter or a matter fraught with legal ramifications is not easily answered, and has been a matter of ongoing debate between lawyers and nonlawyers for many decades. There are many non-trial-type functions in noncourtroom settings which today can be, and are, performed competently by lawyers and nonlawyers alike, regardless of the fact that legal consequences affecting rights and obligations of parties may flow from the performance of any one of them. Casebooks are replete with judicial decisions allowing nonlawyers to undertake a variety of activities, such as real estate settlements, creation of trusts, and tax return preparation, even though these same activities are also performed by lawyers — even specialized in by some lawyers — and have legal consequences.⁴⁴

Interviews with mass justice agency personnel revealed a high level of satisfaction with nonlawyer representatives, not only at the early stages of assisting with forms and informal conferences, but also at later stages of agency proceedings.⁴⁵ The overwhelming opinion is that there is little perceived difference in the quality of help between lawyers as a class and nonlawyers as a class.⁴⁶ Viewpoints on competence and quality of work are necessarily subjective. Investigation reveals, however, that agency staff perceptions (that nonlawyers perform as competently as lawyers at virtually all stages of administrative agency proceedings) are supported by the agencies' statistical data.

Social Security Administration data for 1983 show that nonlawyers

43. *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 309-12 (1985); *Rose*, *supra* note 2, at 27; *Morgan*, *supra* note 27; see also Note, *Representation of Clients Before Administrative Agencies: Authorized or Unauthorized Practice of Law?*, 15 VAL. U.L. REV. 567 (1981) (explaining confusing state of law regarding laypersons representing clients in administrative proceedings).

44. Conversely, courts have also found at various times that the identical activities constitute the practice of law and can be performed only by lawyers. In barring nonlawyers from practice before state administrative agencies, state courts have tended to over-emphasize the extent of the legal skills and training required without considering the objectives of the administrative agency and the informal nature of its proceedings. This thesis emerges from a study of state unauthorized practice decisions concerning practice before state administrative agencies. Note, *supra* note 43, at 565.

45. See *Rose*, *supra* note 2 (outlining similar findings of agency satisfaction with nonlawyer performance in administrative proceedings); see also 1985 AMERICAN BAR ASSOCIATION REPORT, *supra* note 30 (describing findings of agency satisfaction with nonlawyer performance).

46. See 1985 AMERICAN BAR ASSOCIATION REPORT, *supra* note 30 (disclosing most agencies reported nonlawyers did not pose any special practice problems, and of those voicing complaints, nearly all said problem encountered most frequently was nonlawyer unfamiliarity with procedural rules and tactics).

made a significant difference when they represented claimants in hearings. Claimants represented by nonlawyers were more likely to win their cases than they were if unrepresented. Moreover, representation by nonlawyers resulted in reversal rates after hearings that were almost as high as those achieved by lawyers. The 1983 data reveal that those who were unrepresented obtained reversals in only 43.7% of their cases. Persons represented by a nonlawyer obtained a reversal rate of 54.5%, as compared to a reversal rate in lawyer represented cases of 59%.⁴⁷ Thus, nonlawyers increased their clients' chances of reversal by 10.8% over those who were unrepresented, and persons represented by a lawyer were successful in only 4.5% more cases than persons represented by nonlawyers.

Similarly, the record in *Walters v. National Association of Radiation Survivors*⁴⁸ showed that in disability review proceedings of the Veterans' Administration the reversal rates on appeals to the Board of Veterans' Appeals were low overall, but that persons represented by nonlawyers were probably as likely to prevail as those represented by lawyers. The VA's statistics demonstrated that veterans represented by laypersons from nonprofit service organizations, such as the American Legion, prevailed in approximately 16% of their appeals to the Board, and that veterans represented by privately retained lawyers and non-lawyer agents prevailed in 18% of the appeals.⁴⁹

Even in agencies where the subject matter can be technical or complex, there is empirical evidence to demonstrate that nonlawyers can provide effective assistance. The processing of patent claims before the Patent Office, for example, is not within the technical expertise of most persons, lawyers or nonlawyers. As the Supreme Court observed in

47. *Participant Involvement in Request for Hearing Cases for Fiscal Year 1983*, *supra* note 6 (detailing statistical results by Social Security Administration); Popkin, *supra* note 6 (finding representation significantly increased chances of reversal of initial adverse agency rulings in three federal agency disability actions). The SSA study did not focus its attention on the differences between attorney and nonattorney representation or the ensuing results. It did disclose, however, that in Social Security disability hearings, attorneys were no more likely than nonlawyers to request new hearings, although the attorneys were more likely to present new evidence.

48. 473 U.S. 305, 310 (1985).

49. Several nonprofit agencies and the District of Columbia Bar provide intensive training courses and materials for nonlawyers in disability benefits law and in immigration matters. Interviews with the training directors for those programs elicited the universal response that the success rates of their intensively trained nonlawyers were very high. Interview with Yvonne Vega, Executive Director of AYUDA, Washington, D.C.; Interview with Michael Schuster, Legal Counsel for the Elderly, Washington, D.C. It should be noted that the success rates of nonlawyer employees of nonprofit organizations are enhanced by training programs and, when it is provided, by the supervision and assistance of staff lawyers.

Sperry v. Florida ex rel. Florida Bar, “drafting of the specifications and claims of the patent application . . . this Court long ago noted ‘constitute[s] one of the most difficult legal instruments to draw with accuracy.’”⁵⁰ The *Sperry* Court went on to note: “And upon rejection of the application, the practitioner may also assist in the preparation of amendments . . . which frequently requires written argument to establish the patentability of the claimed invention under the applicable rules of law and in light of the prior art.”⁵¹

Notwithstanding the legal difficulties alluded to by the Court, the Court unanimously concluded that the activities involved in patent law practice could be performed by nonlawyers as well as lawyers.⁵² Moreover, the Patent Office has consistently reported a high degree of satisfaction with the quality of representation provided by nonlawyer patent agents. Other federal agencies also allow nonlawyer representation, notwithstanding the fact that the subject matter of the representation requires considerable technical legal expertise. Examples include the Internal Revenue Service and the Interstate Commerce Commission.⁵³

A number of the nonprofit agencies interviewed stressed that their nonlawyer employees and volunteers were specially and intensively trained to fill out administrative agency forms and to answer questions concerning agency rules and procedure.⁵⁴ They opined that it was their experience that lawyers in private practice rarely, if ever, received any training in these functions as part of their law school curricula. Others noted that their experience indicated that nonlawyers could be trained to perform virtually all functions in administrative agency proceedings. The training given included representation in adversarial hearings and stressed the need to compile an adequate record for any eventual judicial review.⁵⁵

Commentators have undertaken to analyze the various skills commonly thought of as “lawyers’ skills,” including such skills as negotiating techniques, analytic abilities, powers of written and oral communication, reasoning, and judgment, and concluded that some or all of these skills are also possessed by many nonlawyer professionals.⁵⁶ This study has not attempted to parse finely the particular skills involved in

50. 373 U.S. 379, 383 (1963) (quoting *Topliff v. Topliff*, 145 U.S. 156, 171 (1892)).

51. *Id.* at 383.

52. *Id.* at 404.

53. 31 C.F.R. §§ 10.3-8 (1987) (IRS); 49 C.F.R. §§ 1103.2, .3 (1987) (ICC).

54. See sources cited *supra* note 49 (explaining training).

55. See generally Statsky, *supra* note 13.

56. See Morgan, *supra* note 27 (discussing lawyering skills).

each stage of each mass justice agency proceeding. However, one common theme that was heard recurrently in interviews and confirmed by observations of mass justice agency proceedings was that those professionals, both lawyers and nonlawyers, who are trained and experienced in particular functions do them relatively well. Conversely, having a law degree, or any other degree, was no guarantee of proficiency in all administrative agency functions. This appears to be as true at the most advanced representational functions in agency proceedings as it is in courtroom proceedings.⁵⁷

It is useful to examine for comparison purposes the proceedings of the Internal Revenue Service. Nonlawyers regularly assist taxpayers at the earliest stages of simple tax return preparation all the way through the various levels of the Service, including audits and appeals. In addition, a nonlawyer may, by an examination procedure, become qualified to practice before the United States Tax Court.⁵⁸ While only lawyers, certified public accountants, and those who pass examinations ordinarily provide representation at the highest levels of agency proceedings, nonlawyers who are not in any of these categories are also entitled to appear and assist taxpayers in connection with tax returns that they prepare.⁵⁹

Some of the nonlawyers providing assistance are highly skilled and trained in tax law, including certified public accountants. Those persons who receive minimal training and work for high volume clinics, such as those operated by H & R Block, or who conduct their own individual tax services, may be distinctly less well trained and frequently do not have bookkeeping, accounting, or legal experience. Internal Revenue

57. Former Chief Justice Burger, in a famous Fordham University speech, stated his opinion that one-third to one-half of the lawyers who appear in serious cases before the courts are not truly qualified to render fully adequate representation. Burger, *The Special Skills of Advocacy*, 42 *FORDHAM L. REV.* 227, 234 (1973); see also Bazelon, *The Defective Assistance of Counsel*, 42 *U. CIN. L. REV.* 1 (1973). Criticism of deficiencies in trial representation led to the appointment of a Committee to Consider Standards to Practice in the Federal Courts (chaired by Chief Judge Devitt of Minnesota). Fourteen federal courts engaged in a resulting pilot proposal requiring an examination, minimum trial experience, and peer review. See Winter, *Federal Courts Implement Devitt Proposals*, 67 *A.B.A. J.* 550 (1981) (explaining mandatory exam for new lawyers to qualify to practice in Rhode Island federal court).

58. See sources cited *supra* note 34 (listing statistics of plaintiffs' agents); see also 31 *C.F.R.* §§ 10.3-8 (1987) (delineating eligibility to practice).

59. One may become an enrolled agent by passing a rigorous examination. This enables the person enrolled to advertise to the public that he or she is an enrolled agent and to provide representation in any matters, including appeals from matters handled by others. This procedure, however, does not preclude persons who are not lawyers, CPA's, or enrolled agents from providing the same services in connection with their own clients whose tax returns they have prepared.

Service officials who were interviewed reported that the Service does not maintain statistical data on comparative success rates by lawyers and nonlawyers. They did, however, express views similar to those persons interviewed at the SSA and INS: there is little discernible difference in effectiveness between lawyers and nonlawyers as groups. The differences lie in the relative intelligence and skills of the particular individual.

It is important to note that agency officials interviewed for this study did not suggest that a lawyer may never be able to perform any representational functions "better" than a nonlawyer. It was further recognized that even the preparation of a simple tax return, an application for disability benefits, or a petition for adjustment of nonresident status can be fraught with peril for the client if poorly done and not corrected. The importance in many proceedings of establishing a record for possible future judicial review was also acknowledged. Nonetheless, agency personnel stressed that in their experience there was no guarantee that any given lawyer would necessarily provide better representation than any given nonlawyer.

Thus, it appears that the relevant inquiry is not whether a particular lawyer can provide better representation in a given matter than a nonlawyer, or might have a slightly higher statistical chance of obtaining reversal on administrative review, but whether all lawyers as a class perform better than the class of nonlawyers. The statistical data concerning success rates in mass justice agencies and the subjective data elicited in interviews suggest that the answer to the latter question is in the negative.

Moreover, this author suggests that the most pressing issue regarding representation before mass justice agencies is not whether a given lawyer will do a better job than a given nonlawyer, or will build a better record for judicial review than a nonlawyer; the question is whether sufficient numbers of proficient lawyers are able and willing to provide the assistance needed and desired by large numbers of ordinary citizens with everyday claims and disputes before agencies, and for fees that individuals can afford. The evidence discussed in Part I above compels the conclusion that lawyers are not available to meet the needs.

As will become apparent in the succeeding sections of this Article, the Administrative Procedure Act,⁶⁰ as well as several statutes governing specific agencies, empower federal administrative agencies to authorize lay representation. Mass justice agencies, however, fail to do as much as they might under these statutes to encourage this represen-

60. 5 U.S.C. § 555(b) (1982).

tation. In addition, although federal statutes, and some agency regulations, provide a measure of protection to lay representatives against prosecution under state unauthorized practice laws, this protection needs to be strengthened to encourage significant numbers of additional nonlawyers to provide assistance, particularly assistance to moderate income persons who can afford to pay modest fees.

III. FEDERAL MASS JUSTICE AGENCIES HAVE AUTHORITY TO AUTHORIZE NONLAWYER ASSISTANCE IN ADMINISTRATIVE PROCEEDINGS

Representation by nonlawyers in formal federal agency proceedings, as well as the giving of advice and assistance with forms prior to formal appearances, is not a novel concept. From the earliest days of federal agencies, nonlawyers have provided representation, even in trial-type adjudications, in many agencies.⁶¹ In fact, nonlawyer practice at all levels of agency action has been the norm from the inception of the Patent Office, the Internal Revenue Service, and the Interstate Commerce Commission.⁶²

One of the earliest provisions for nonlawyer representation involved veterans' benefits. In 1862, Congress provided that both lawyers and nonlawyer agents could assist Civil War veterans seeking disability benefits. This provision has been extended to cover other war veterans and has continued to this day.⁶³

61. See generally Von Baur, *The Practice of Non-Lawyers Before Administrative Agencies*, 15 FED. B.J. 99, 113-15 (1955); Gellhorn, *supra* note 42 (demonstrating contrasting views as to merits of historical development).

62. The Patent Office's first admission requirements were issued in 1869 and provided that "any person of intelligence and good moral character may appear as the attorney in fact or agent of an applicant . . ." Rules and Directions for Proceedings in the Patent Office, § 127 (Aug. 1, 1869). Although there were many efforts between 1898 and 1938 to limit Patent Office practice to lawyers, Congress steadfastly refused to bar nonlawyers. See *Sperry v. Florida ex rel. Florida Bar*, 373 U.S. 379, 388-96 (1963) (discussing legislative history of efforts to limit Patent Office practice); see also *Hull v. United States*, 390 F.2d 462, 464-65 (D.C. Cir. 1968) (discussing efforts after 1938 to limit nonlawyer practice in Patent Office).

63. Act of July 14, 1862, 12 Stat. 556, 568 (1862), amended by Act of July 4, 1864, 13 Stat. 389 (1864). An interesting footnote to federal agency history is that the original 1862 Veterans Disability Benefits statute reflected outright antipathy to lawyers. That Act set a \$5 fee cap (changed two years later to \$10) for providing assistance to Civil War veterans seeking disability benefits. The \$10 fee cap is still in effect. It is generally acknowledged that even though the fee limitation is applied to both lawyers and nonlawyers, "the limitation was designed to protect the veteran from extortion or improvident bargains with unscrupulous lawyers." *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 306 & n.57 (1985) (Stevens, J., dissenting). Justice Stevens presents a persuasive argument that the fee limitation provision was not originally intended to exclude *all* lawyer representation, which is its practical effect

For some agencies, there is explicit legislative authority for nonlawyer practice.⁶⁴ In other agencies, nonlawyer practice has simply evolved without express statutory authority. There has been some judicial recognition of the notion that an agency's authority to govern practice may be implied from its general powers to prescribe rules of procedure, irrespective of specific legislative authority.⁶⁵ In any event, Congress has the authority to empower federal agencies to issue rules governing practice before them, and courts have not attempted to interfere with that legislative authority.⁶⁶

The legislative history of the Administrative Procedure Act reveals that at the time of its enactment in 1946, Congress continued to believe that agency practice should not be limited solely to lawyers. By this point, however, administrative agency decisions had proliferated and there were increased urgings by the organized bar to exclude nonlawyers.

The Chairman of the American Bar Association's Committee on Administrative Law, testifying in 1945 before the House Judiciary Committee Hearings on proposed bills dealing with administrative proce-

today. He noted that a \$10 fee in 1864 is equivalent to \$580 today and that it is more likely that Congress intended to impose that amount as a reasonable fee cap than to exclude lawyers from representation of veterans altogether. *Id.* at 360-66 (Stevens, J., dissenting). The effect of the fee cap is to limit all representation for fees from both lawyers and nonlawyers. This result has stirred considerable controversy and in recent years there have been several, thus far unsuccessful, efforts to enact legislation that will eliminate the fee cap.

The majority in *Walters* upheld the \$10 fee limitation against a challenge that it unconstitutionally precluded representation by lawyers. The majority found the record did not show that veterans were harmed by nonlawyer representation. *Id.* at 334. Justice Stevens dissented and argued that whether or not lawyers would be more successful in veterans proceedings than nonlawyers, the fee limitation limits the free choice of representative and that limitation is both harmful and an unconstitutional infringement of individual liberty. *Id.* at 368-72 (Stevens, J., dissenting).

64. For example, the Patent Act, 35 U.S.C. § 31 (1982), expressly authorizes the Patent Office to issue rules admitting lawyers and nonlawyers, and the Attorney Practice Act, 5 U.S.C. § 500 (1982), expressly entitles certified public accountants to practice as a matter of right before the Internal Revenue Service. In addition, the enabling statutes for some welfare programs expressly provide for representation by nonlawyers.

65. See *Goldsmith v. United States Board of Tax Appeals*, 270 U.S. 117, 122 (1926) (enunciating power of Board of Tax Appeals); see also *Herman v. Dulles*, 205 F.2d 715 (D.C. Cir. 1953) (stating international Claims Commission has express authority to prescribe rules and regulations to carry out its functions); *Sperry v. Florida ex rel. Florida Bar*, 373 U.S. 379, 403 (1963) (discussing congressional ratification of prior agency practice, and acknowledging implied authority of agencies to regulate practice before them).

66. Conversely, not all state courts have agreed that state legislatures have authority to empower state administrative agencies to permit lay representation. See Note, *supra* note 43, at 569-71 (stating extent to which legislatures enact statutes regulating practice of law varies from state to state).

dure, stated: "[T]here is a great deal of protest from the committees on unauthorized practice of the law in various State, local and municipal bar associations who are just as vehement in saying that these measures fail to recognize that legal procedure must be confined to lawyers."⁶⁷ The extent to which nonlawyers should be allowed to practice before federal administrative agencies was vigorously debated both in and out of Congress for more than a decade. As early as 1941, the Attorney General's Committee on Administrative Practices examined the need for various reforms in administrative agencies. The ensuing report stated "[e]specially among lawyers' organizations there has been manifest a sentiment in recent years that only members of the bar should be admitted to practice before administrative agencies. The Committee doubts that a sweeping interdiction of nonlawyer practitioners would be wise"⁶⁸

The debate over the role of nonlawyers in federal agency practice continued until the passage by Congress of the Administrative Procedure Act in 1946.⁶⁹ The final outcome, as stressed by the Supreme Court in its unanimous *Sperry*⁷⁰ decision, was that "[d]espite protests

67. *Hearings Before the House Comm. on the Judiciary and Federal Administrative Procedure*, 79th Cong., 1st Sess. 33-34 (1945); LEGISLATIVE HISTORY OF THE ADMINISTRATIVE PROCEDURE ACT, S. DOC. NO. 248, 79th Cong., 2d Sess. 79-80 (1945).

68. ATTORNEY GENERAL'S COMM. ON ADMINISTRATIVE PROCEDURE, FINAL REPORT 124 (1941), quoted in *Sperry v. Florida ex rel. Florida Bar*, 373 U.S. 379, 396 (1963). A more recent example of the belief that agency practice should be restricted to lawyers occurred during comments to the proposed rules of the Immigration and Naturalization Service to revise its procedures concerning the accreditation of nonprofit agencies to assist persons in INS proceedings. The Service reported that the most severe adverse comments came from those who expressed the view that agency practice should be limited entirely to lawyers. 49 Fed. Reg. 44,086 (1984) (codified at 8 C.F.R. § 292.2).

69. During house debates on the matter of lay representation, the following illustrative exchange occurred:

Mr. Austin: [I] notice . . . in the section to which the Senator is referring, this language: "Nothing herein shall be construed either to grant or to deny to any person who is not a lawyer the right to appear for or represent others before any agency or in any agency proceeding." Is it not a fact that somewhere in the bill the distinguished Senator has reserved the right to a non-professional — that is, a man who is not a lawyer — to appear, if the agency having jurisdiction permits it? For example, take a case where a scientific expert would better represent before the Commission the interests involved than would a lawyer. The right to obtain that privilege is granted in the bill somewhere, it is not?

Mr. McCarran: The Senator is correct; and in connection with that I wish to read from the Attorney General's comment, as follows: "This subsection does not deal with, or in any way qualify, the present power of an agency to regulate practice at its bar. . . . Control over this matter remains in the respective agencies."

LEGISLATIVE HISTORY OF THE ADMINISTRATIVE PROCEDURE ACT, S. DOC. NO. 248, 79th Cong., 2d Sess. 316-17 (1945).

70. *Sperry v. Florida ex rel. Florida Bar*, 373 U.S. 379 (1963).

of the bar, Congress in enacting the Administrative Procedure Act refused to limit the right to practice before the administrative agencies to lawyers."⁷¹ Rather, Congress determined that it would continue the existing practice of allowing each agency to determine for itself whether, and under what conditions, nonlawyers would be admitted to the bar of the agency.⁷² Accordingly, Congress provided in section 6(a) of the 1946 Act, dealing with "ancillary matters," that agencies could, in their discretion, authorize nonlawyer representation. The current version of this provision is not substantively different from the original section 6(a) and is now set forth in section 555(b) of the Administrative Procedure Act:

A person compelled to appear in person before an agency or representative

71. *Id.* at 388; *see also id.* at 396-99 (providing review of the legislative history of Administrative Procedure Act provision dealing with nonlawyer representation).

72. *Id.* at 397. Congress also determined at the time of enactment of the APA to continue to allow federal agencies to establish requirements for the admission of lawyers, even though bar groups objected to this practice. Congress also defeated an amendment to the Administrative Procedure Act introduced on the floor of the House which would have abolished agency admission requirements for lawyers. *See ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 65 (1947)*. Subsequently, many agencies discontinued the practice of imposing admission requirements on licensed attorneys, and in 1965 Congress enacted the Attorney Practice Act, 5 U.S.C. § 500 (1982), which admits attorneys as a matter of right to practice before all federal agencies, with the exception of the Patent and Trademark Office. Certified public accountants were also entitled to a right to practice before the Internal Revenue Service.

In enacting the Attorney Practice Act, Congress also provided that agencies could continue to set admission requirements for nonlawyers and reaffirmed the earlier congressional intention set forth in 5 U.S.C. 555(b) (1982) to give agencies discretionary authority over the question of nonlawyer admission. Thus, the Attorney Practice Act expressly provides that the statute "does not grant or deny to an individual [who is not a lawyer or a CPA] the right to appear for or represent a person before an agency or in an agency proceeding." 5 U.S.C. § 500(d)(1) (1982). The agencies retain their authority under the Attorney Practice Act to regulate the conduct and impose discipline on both attorneys and laypersons after their admission to practice. *REPORT TO ACCOMPANY S. 1758 BEFORE THE SENATE COMM. ON THE JUDICIARY, S. REP. NO. 755, 89th Cong., 1st Sess. (1965); REPORT TO ACCOMPANY S. 1758 BEFORE THE HOUSE COMM. ON THE JUDICIARY, H.R. REP. NO. 1141, 89th Cong., 1st Sess (1965), reprinted in 1965 U.S. CONG. & ADMIN. NEWS 4170.*

Bar groups have objected to federal agency authority to discipline lawyers, but thus far agencies have retained this authority. A committee of the Administrative Conference of the United States stated in a report that "agencies ought to have authority to discipline attorneys to maintain the integrity of their own proceedings . . ." *Administrative Conference Committee on Government Processes, Report Concerning Discipline of Attorneys Practicing Before Federal Agencies, 1982 ACUS 488 (1984); see also Cox, Regulation of Attorneys Practicing Before Federal Agencies: Report to the Administrative Conference of the U.S., 34 CASE W. RES. 173 (1984) (proposing Congress delegate authority to promulgate uniform standards of conduct). The Conference adopted a statement in 1982 that any problems concerning attorney discipline before federal agencies were not of such a magnitude as to require changing the statutory authorization or adoption of uniform federal standards. 1 C.F.R. § 310.8 (1987).*

thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. . . . This subsection does not grant or deny a person who is not a lawyer the right to appear for or represent others before an agency or in an agency proceeding.⁷³

The Attorney General's Manual on the Administrative Procedure Act, published in 1947, is the principal guide to the legislative intent of the APA. The Manual explains the legislative intent regarding Section 6(a):

The phrase "or, if permitted by the agency, by other qualified representative" refers to the present practice of some agencies of permitting appearance or representation in certain matters by nonlawyers, such as accountants. The phrasing of this clause, together with the last sentence of the subsection, makes it clear that nothing in the first section was intended to change the existing powers of agencies in this respect.⁷⁴

* * *

The last sentence of section 6(a) provides that "Nothing herein shall be construed either to grant or to deny to any person who is not a lawyer the right to appear for or represent others before any agency or in any agency proceeding." The question of the extent to which nonlawyers should be permitted to practice before administrative agencies was deliberately left to the determination of the various agencies, as heretofore.⁷⁵

73. 5 U.S.C. § 555(b) (1982).

74. ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 62 (1947).

75. *Id.* at 65 (citing House Hearings, at 34 (1945) (SEN. DOC., at 80; H.R. REP., at 32; SEN. DOC., at 264)). Although the *Attorney General's Manual* comments that the first sentence of section 6(a) dealing with the right of a party to counsel "does not extend to persons who appear voluntarily," the provision as a whole is generally interpreted to authorize lay representation in all proceedings, including voluntary appearances to apply for government benefits or grants, if lay representation is permitted by the agency. ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 61-62 (1947). This broad interpretation is in accord with the expressed legislative intent noted by the Attorney General not to change the then-existing practice of non-lawyer representation in a wide range of agency proceedings, which included at the time voluntary patent applications and applications for veterans' disability benefits. *Id.* at 61-66.

Even in cases presenting the issue of whether a party is entitled to counsel, rather than the right of practice before an agency, the provision has often been broadly and liberally interpreted to require an agency to permit representation of choice in a broad range of administrative proceedings. See *Coyle v. Gardner*, 298 F. Supp. 609 (D. Haw. 1969) (holding applicant for Social Security benefits entitled to choice of counsel at hearing before examiner); *United States v. Smith*, 87 F. Supp. 293, 294 (D. Conn. 1949) (expressing that since section is intended to establish uniform standards of fairness for dealings of administrative bodies with citizens, courts should prefer a broader interpretation where two interpretations are possible, one of which would narrow and the other broaden the categories of citizens touched by administrative process to which protection is extended). *But see* Interview with Yolanda Sanchez, Acting Director, Outreach Program, INS (taking opposite position that in proceedings where persons are not compelled to appear, they are not entitled as matter of right to assistance of nonlawyer, and hearing officers may exercise discretion in deciding whether to admit a

In accordance with the general authorization provided in section 555(b) of the Administrative Procedure Act, and in some cases under the additional authority of specific statutes, the great majority of federal agencies today permit at least some degree of nonlawyer representation in both adversarial and nonadversarial proceedings.⁷⁶ However, as shall be discussed below, nonlawyer representation does not occur frequently as a matter of actual practice.

Some commentators have noted that one historical rationale for admitting nonlawyers to practice before agencies such as the Patent Office and the Internal Revenue Service was the belief that certain categories of nonlawyers had highly specialized skills and knowledge enabling them to provide especially competent representation. These nonlawyers were thought to be more likely to have the requisite specialized knowledge than were lawyers.⁷⁷ Senator Austin's statement in the debates on the APA that sometimes "a scientific expert would better represent before the Commission the interests involved than would a lawyer" reflects that sentiment.⁷⁸ This "highly specialized competence" explanation is not as apt, however, with respect to the early authorization for lay representation in mass justice agencies such as the Veterans' Administration. In this area, specialized competence in helping veterans apply for disability benefits was not a factor in the statutory encouragement of nonlawyer assistance.

Another plausible explanation for the early admission of nonlawyers to federal agency practice is that bar groups did not at first vigorously resist the use of lay practitioners. Large numbers of lawyers had not yet developed specialized federal agency practices, and perhaps did not view representation before agencies as "lawyering."⁷⁹

nonlawyer representative).

76. See 1985 AMERICAN BAR ASSOCIATION REPORT, *supra* note 30 (concluding although universally permitted, lay practice before federal agencies rarely occurs).

77. Rose, *supra* note 2.

78. LEGISLATIVE HISTORY OF THE ADMINISTRATIVE PROCEDURE ACT, S. DOC. NO. 248, 79th Cong., 2d Sess. 316-17 (1945). This view finds some support in the history of the first administrative agencies. As early as 1915, the Commissioner of Patents wrote in his Annual Report: "Fundamentally, knowledge of the invention is more important than knowledge of the rules and is often possessed by men of a type of mind which does not acquire legal knowledge readily." 1915 U.S. PATENT OFFICE ANN. REP. XIV, *quoted in* Sperry v. Florida *ex rel.* Florida Bar, 373 U.S. 379, 392 (1963). This view has also been expressed occasionally in court decisions. See *Auerbacher v. Wood*, 53 A.2d 800, 802 (N.J. Ch. 1947), *aff'd*, 59 A.2d 863 (N.J. 1948) (opining that with respect to industrial relations consultant's practice before National Labor Relations Board, factual knowledge of industry is often more important in labor relations than legal knowledge).

79. Many commentators have been highly critical of the bar's efforts during this century to limit administrative agency practice to lawyers and sense in these efforts a

A further explanation for the historical admission of nonlawyers is that many agency proceedings were viewed in their earliest days as offering essentially informal, nonlegalistic, and often nonadversarial processes where formal rules of evidence and procedure would be largely inapplicable.⁸⁰ Of course, early evaluations of federal agency procedures as essentially informal, nonlegal processes have been substantially modified in recent decades. Many agency proceedings have become considerably more complex, paralleling the development of the doctrine of property rights in governmental benefits.⁸¹ Furthermore, lawyers have become increasingly involved in federal agency practice, and that practice has also spawned an ever increasing volume of judicial review. Notwithstanding these developments, the federal statutory framework has continued to accommodate nonlawyer representation, both through section 555(b) of the APA and through other statutes authorizing lay representation before specific agencies.⁸²

In mass justice agencies particularly, accommodation of nonlawyer representatives continues to make practical sense in light of the fact that many proceedings in those agencies are still fairly routine and informal. Even in proceedings where the issues are somewhat more complex, or are a mixture of fact and law, and even where the proceedings are adversarial, this study has determined (as discussed above in Part II) that nonlawyers can provide competent representation.

IV. MASS JUSTICE AGENCY REGULATIONS DO NOT MAXIMIZE THE POTENTIAL FOR INCREASED NONLAWYER PROFESSIONAL ASSISTANCE BECAUSE THEY DO NOT ADEQUATELY PROTECT NONLAWYER PROFESSIONALS FROM STATE UNAUTHORIZED PRACTICE LAWS

Despite congressional authority to permit nonlawyer representation in administrative proceedings, agencies have not uniformly encouraged this representation, and there has been little guidance in the matter from either Congress or the management offices of the Executive Branch. As a result, even though the regulations of most agencies permit nonlawyer representation in principle, only a handful of agencies encourage nonlawyer assistance as a matter of actual practice. This

bald attempt to establish a lawyers' monopoly. Rose, *supra* note 2, at 2; Morgan, *supra* note 27; Comment, *Unauthorized Practice of Law: Supreme Court Holds States Cannot Restrict Activities on Nonlawyer Patent Office Practitioner*, 1964 DUKE L.J. 190.

80. Gellhorn, *supra* note 42.

81. See *Goldberg v. Kelly*, 397 U.S. 254, 276 (1970) (holding termination of federal financial aid without notice and hearing denial of due process of law).

82. See sources cited *supra* note 62 (stating qualified representatives other than counsel may be permitted to practice before Patent Office).

finding emerges from three sources: interviews and statistical data obtained in connection with this study; interviews and statistical data summarized in a 1985 study by the American Bar Association's Standing Committee on Lawyers' Responsibility for Client Protection and the American Bar Association Center for Professional Responsibility; and interviews and statistical data obtained by Professor Jonathan Rose and set forth in his unpublished report to the Administrative Conference of the United States on April 9, 1984.⁸³

The American Bar Association Committee received responses from 97% of the 33 federal agencies surveyed. Most of the agencies responding reported that they permit nonlawyer representation in some circumstances, and also reported that they permit nonlawyer representation in both adversarial and nonadversarial proceedings.⁸⁴ Nonetheless, the American Bar Association Committee found that while the great majority of agencies allow nonlawyer representation in principle, "most of them seem to encounter lay practice very infrequently."⁸⁵ Nonlawyer practitioners were reported to appear overall in only 5% of adjudications.⁸⁶ In general, mass justice agencies reported higher levels of nonlawyer representation than did other agencies.⁸⁷

The findings of the American Bar Association Committee with respect to mass justice agencies are generally consistent with those of the Rose report. The findings for the agencies examined in this study can be summarized as follows.

The Internal Revenue Service. As noted in Part II, the Internal Revenue Service does not maintain statistics on the category of representatives in its proceedings. A large number of nonlawyers are, however, registered to practice before the Service, indicating that nonlawyer representation is very common.⁸⁸

The Veterans' Administration. As also noted previously, the statutory \$10 fee cap on veterans' disability benefit claims has effectively deterred lawyers from providing representation in these matters. The \$10 fee cap likewise deters nonlawyers from providing representation for fees. The Veterans' Administration reports that there is a long tradition of free assistance to veterans provided by military service organi-

83. 1985 AMERICAN BAR ASSOCIATION REPORT, *supra* note 30. Professor Rose's study focused on nonlawyer representation in economic regulatory proceedings. Rose, *supra* note 2. It identified 14 federal agencies which did not permit any nonlawyer representation. *Id.*

84. 1985 AMERICAN BAR ASSOCIATION REPORT, *supra* note 30, at 1.

85. *Id.*

86. *Id.*

87. *Id.*

88. Rose, *supra* note 2, at 51-54.

zations and other nonprofit agencies, such as the American Red Cross. Accordingly, these organizations provide assistance in 86% of the disability claims cases.⁸⁹

The Immigration and Naturalization Service. The Immigration and Naturalization Service does not maintain statistics on representation, but agency personnel report that while there is a substantial amount of assistance provided by nonlawyers, the nonlawyers are either employees of nonprofit agencies or relatives and friends appearing without fee on a one-time basis. It is widely estimated that large numbers of persons in INS proceedings are completely unrepresented.⁹⁰

The Social Security Administration. The Social Security Administration permits nonlawyer representation in both adversarial and nonadversarial proceedings. Nonlawyer representatives are also entitled to receive fee awards. However, nonlawyer representation constituted only 11.2% of the representation in all Social Security requests for hearing matters in 1983. Another 1.4% of the matters included nonlawyers appearing jointly with lawyers. Lawyers provided representation in 50.5% of the matters, and claimants in approximately 38% of the matters were unrepresented.⁹¹ Although the Social Security Administration does not maintain data on the employment status of nonlawyers, persons interviewed in connection with this study generally agreed that the overwhelming majority of nonlawyers were relatives and friends appearing without fee on a one-time basis or paralegals and other employees of nonprofit organizations.

The principal reason for the low incidence of lay representation overall, and the virtual nonexistence of lay representation for fee in mass justice agencies, is that many agencies have not issued clear regulations or adopted other measures to implement the authority of section 555(b) of the Administrative Procedure Act.⁹² Additionally, these agencies have not encouraged nonlawyer representation, particularly representation for fee.⁹³ Section 555(b) is not self-executing. The right of nonlawyers to practice before each agency must be determined by ref-

89. *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 310 (1985).

90. Interview with Yolanda Sanchez, Acting Director, Outreach Program, INS.

91. *Participant Involvement in Request for Hearing Cases for Fiscal Year 1983*, *supra* note 6.

92. 5 U.S.C. § 555(b) (1982).

93. Implementation of the statute can include, in addition to the issuance of clear regulations, measures such as the establishment of registers, administration of examinations, imposition of experience criteria, imposition of fee award criteria, and licensing or certification procedures. A few agencies, including the Internal Revenue Service and the Patent Office, have adopted some of these additional measures. The Immigration and Naturalization Services has imposed competence criteria, but only for employees of nonprofit organizations.

erence not only to section 555(b) but also "by reference to the statute and regulations applicable to the particular agency."⁹⁴ While the APA authorizes agencies to allow nonlawyer representation, each agency ordinarily has the final decision on whether, and to what extent, nonlawyers will be permitted or encouraged to provide representation. This is because few agencies are governed by statutes compelling or banning legal representation.⁹⁵

Most importantly of all, if agency regulations and other agency measures do not unambiguously authorize laypersons to practice before the agency, nonlawyers attempting to provide assistance may be in jeopardy of prosecution under state laws and court rules prohibiting unauthorized practice of law. Agency failure to provide protection against state unauthorized practice laws has been the single most chilling deterrent to the development of nonlawyer specialists to assist low and moderate income persons in the immigration and Social Security fields. It has also been a chilling deterrent to nonlawyer assistance before state administrative agencies, but that is beyond the scope of this Article. This problem cannot be overstated. One cannot address the issue of the inadequate numbers of nonlawyers to help low and moderate income persons in mass justice agencies and ignore the very real problem of the adverse impact of state unauthorized practice laws on nonlawyer representation. Equally real is the fear of prosecution under those laws.

The longstanding conflict between state bar unauthorized practice committees and nonlawyer groups over what constitutes the "practice of law" is well known. Numerous nonlawyers and nonlawyer entities, including real estate brokers, collection agencies, banks, accountants, publishing houses, title companies, insurance companies, and social workers, have all been subjected at one time or another, in one jurisdiction or another, to charges of unauthorized practice of law.⁹⁶ One

94. *Sperry v. Florida ex rel. Florida Bar*, 373 U.S. 379, 397 (1963).

95. There are a few instances in which a federal statute affects the scope of an agency's authority to govern practice before it. For example, the Attorney Practice Act, 5 U.S.C. § 500 (1982), entitles CPA's to practice before the Internal Revenue Service, and lawyers to practice as a matter of right before all federal agencies except the Patent Office.

96. Many articles have been written critically examining state unauthorized practice decisions. For extensive survey and analysis of state decisions, see especially Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1 (1981), and Morgan, *supra* note 27. See also Christensen, *The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors — Or Even Good Sense?* 1980 AM. B. FOUND. RES. J. 159; Weckstein, *Limitations on the Right to Counsel: The Unauthorized Practice of Law*, 1978 UTAH L. REV. 649; Johnstone, *Unauthorized Practice Controversy: A Struggle Among Power Groups*, 4 KAN. L. REV. 1 (1955). See generally, J. FISCHER & D. LACHMAN, UNAUTHORIZED PRACTICE HANDBOOK: A COMPILATION OF STAT-

knowledgeable observer has written that appearances before specialized administrative agencies are one of the "five or six major areas [which] continue to be the primary source of controversy."⁹⁷ A 1980 survey of state bar unauthorized practice enforcement committees revealed that lay representation before state and federal administrative agencies accounted for 5% of bar committee investigations in 1979 and for 10% of the reported judicial decisions between 1970 and 1980. Only two decisions were reported in the decade between 1970 and 1980 which recognized a right to lay representation before administrative agencies.⁹⁸

The longstanding struggle between lawyers and nonlawyers has been exceedingly difficult to resolve. This is mostly because of the inherent difficulties in arriving at a definition of what constitutes the "practice of law."⁹⁹ In order to reach an accommodation with some of the country's major nonlegal entities, the American Bar Association in 1969 published a book of agreements between the Association and 10 professional groups.¹⁰⁰ The preamble to the agreement with the Council of Certified Public Accountants testifies to the difficulty in separating the practice of law from other nonlegal activities, in this particular case, tax accounting:

UTES, CASES AND COMMENTARY ON THE UNAUTHORIZED PRACTICE OF LAW (1972) (updating, compiling, and analyzing authorities on practice of law by lay representatives).

97. Morgan, *supra* note 27, at 708.

98. Rhode, *supra* note 96, at 78.

99. The Stanford survey of reported unauthorized practice decisions between 1970 and 1980 found that the reasoning in those cases was circular or conclusory, or both. *Id.* at 97. Because of the extreme difficulty in arriving at a definition of the "practice of law," some courts have moved to a general definition of the practice of law. This has often led to confusing and inconsistent results. Compare *Clark v. Austin*, 101 S.W.2d 977, 982 (Mo. 1937) (holding layperson appearing before state public service commission was engaged in unauthorized practice) with *Auerbacher v. Wood*, 53 A.2d 800, 801 (N.J. Ch. 1947), *aff'd*, 59 A.2d 863, 864 (N.J. Ch. 1948) (finding industrial relations consultant appearing before National Labor Relations Board was not practicing law but only using his legal knowledge incidentally to provide nonlegal services). For a discussion of these and other cases, see Rhode, *supra* note 96, and Note, *supra* note 43.

100. The American Bar Association Statements of Principles with Respect to the Practice of Law (formulated by representatives of the American Bar Association and various business and professional groups 1969). These statements of principles were subsequently withdrawn because of antitrust concerns. Rose, *supra* note 2; Interview with H. William Allen, Chairman of the American Bar Association's Committee on National Conference Groups. The statements of principles are discussed in Note, *supra* note 43.

It is interesting that, as a general matter, nonlawyers who are members of organizations with the wherewithal to contest unauthorized practice laws, such as banks and insurance companies, have over the years worked out accommodating arrangements with bar groups. Nonorganized individuals attempting to assist low and moderate income persons before state mass justice agencies, however, have generally not fared as well.

In our complex society, the average citizen conducting a business is confronted with a myriad of governmental laws and regulations which cover every phase of human endeavor and raise intricate and perplexing problems. These are further complicated by the tax incidents attendant upon all business transactions. As a result, citizens in increasing numbers have sought the professional services of lawyers and certified public accounts Frequently the legal and accounting phases are so interrelated and interdependent and overlapping that they are difficult to distinguish. Particularly is this true in the field of income taxation where questions of law and accounting have sometimes been inextricably intermingled.¹⁰¹

The statement on unauthorized practice in Ethical Consideration 3-5 of the American Bar Association's Code of Professional Responsibility, which was adopted by most of the states after its promulgation in 1969, added little to the definition of the practice of law. It stated "[i]t is neither necessary nor desirable to attempt the formulation of a single, specific definition of what constitutes the practice of law. Functionally, the practice of law relates to the rendition of services for others that call for the professional judgment of a lawyer."¹⁰² Notwithstanding the difficulty of defining the practice of law, the ABA's 1969 Model Code of Professional Responsibility subjected a lawyer to disbarment or other discipline if the lawyer provided "aid to a nonlawyer in the unauthorized practice of law."¹⁰³

The American Bar Association revised its Model Code and adopted the new Model Rules of Professional Conduct on August 2, 1983. The ABA's Center for Professional Responsibility reports that several states have adopted the new Model Rules, but some states have decided to retain all or part of the 1969 Model Code. The new Model Rules drop the text of Ethical Consideration 3-5 set forth in the 1969 Model Code and no longer attempt even a general definition of the practice of law. The new Model Rules continue, however, to subject lawyers to discipline if they "assist a person who is not a member of the bar in the performance of any activity that constitutes the unauthorized practice of law."¹⁰⁴

101. American Bar Association Agreement with Council of Certified Public Accountants.

102. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 3-5 (1980).

103. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 3-10(A) (1980).

104. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.5 (1983). The new Model Rules also continue the old Model Code ban on a lawyer forming a partnership with a nonlawyer if any part of the partnership consists of "the practice of law." Compare MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4(b) (1983) with MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR § 3-103(A) (1980).

The "legal background" section to Model Rule 5.5 reviews the exceptions "in which an unlicensed individual is permitted to engage in an activity that clearly constitutes the practice of law and would otherwise be prohibited if engaged in by an unlicensed

Similarly, while the Model State Administrative Procedure Act permits lay representation, it does so only if the representation is not prohibited under state unauthorized practice laws. The Model Act does not attempt to define unauthorized practice, but rather leaves it to the various states to determine.¹⁰⁵ A number of states do not allow lay practice before state administrative agencies.¹⁰⁶ A 1980 study, which focused on representation before particular kinds of state administrative agencies and surveyed all 50 states, disclosed that only 20 of 50 workers' compensation boards permitted representation by nonlawyers. The same study found that every state court except California's which considered the issue between 1970 and 1980 denied nonlawyers the right to practice before workers' compensation boards.¹⁰⁷

Federal administrative agency practice has not been spared from state court litigation over the issue of what constitutes the practice of law. Practices before both the United States Patent Office and the Internal Revenue Service were among the early subjects of unauthorized practice litigation in state courts.¹⁰⁸ The unauthorized practice debate

individual. Examples of such activity include . . . activities authorized by federal law e.g., *Sperry v. Florida*" The commentary explains that the excepted activity would not be considered the unauthorized practice of law and concludes: "Accordingly, the ABA Model Rules do not prohibit a lawyer from assisting an unlicensed individual in one of these authorized activities."

The effectiveness of this statement is undercut by the fact that the ABA's introductory section on the scope of the Model Rules stresses that the legal background notes "have not been adopted, do not constitute part of the Model Rules, and are not intended to affect the application or interpretation of the Rules" Neither the relatively more authoritative comment to the Rules, nor the Rules themselves, state that authorized federal agency practice is not the unauthorized practice of law.

105. Model State Administrative Procedure Act, § 4-203(b) & comment (1981).

106. See *Florida Bar v. Moses*, 380 So. 2d 412, 417 (Fla. 1980) (holding lay representation by contract negotiator for school board in Public Employees Relations Commission hearing not permitted); *People ex rel. Chicago Bar Ass'n v. Goodman*, 366 Ill. 346, 8 N.E.2d 941, cert. denied, 302 U.S. 728 (1937) (barring lay representation before the state's Industrial Commission dealing with workmens' compensation issues).

Some state courts have insisted that because control over the practice of law is inherently a function of the state's judicial branch, only the state's supreme court can authorize practice before state administrative agencies. See *West Virginia State Bar v. Earley*, 144 W. Va. 504, 109 S.E.2d 420, 435 (1959) (holding statute authorizing state compensation commissioner to issue rules permitting nonlawyer practice void). A critical appraisal of this case and other similar state cases is set forth in Note, *supra* note 43.

107. Rhode, *supra* note 96, at 78. The study also found that only 11 of 50 public utility commissions permitted lay representation generally. Another 22 commissions permitted only representation by corporate officers or agents.

108. See, e.g., *Sperry v. Florida ex rel. Florida Bar*, 373 U.S. 379, 404 (1963) (reversing Florida Supreme Court's finding of unauthorized practice against nonlawyer patent agent); *Ginsburg v. Kovrak*, 392 Pa. 143, 139 A.2d 889 (upholding injunction enjoining defendant from practicing law where he was not authorized to do so), *appeal dismissed*, 358 U.S. 52 (1958); *Petition of Kearney*, 63 So. 2d 630, 631 (Fla. 1953)

over representation in federal agencies, however, has now subsided with respect to practice before several federal administrative agencies. This has happened where the agencies have issued clear regulations permitting lay representation, and state courts have increasingly recognized the authority of federal agencies to do so under the Administrative Procedure Act and Supreme Court preemption decisions.

The leading Supreme Court preemption decision in the area of non-lawyer practice before federal agencies is *Sperry v. Florida ex rel. Florida Bar*.¹⁰⁹ The *Sperry* case involved a 1952 federal statute which provided that the Commissioner of Patents could "prescribe regulations governing the recognition and conduct of agents, attorneys, or other persons representing applicants or other parties before the Patent Office." Pursuant to this general statutory authority, the Commissioner issued regulations allowing an applicant for patent to be represented by an attorney or authorized agent. The regulations established two separate registers, one listing attorneys and the other naming nonlawyer "agents."¹¹⁰

The Florida Bar brought suit against a patent agent who maintained an office in Florida and held himself out to the public as available to prepare patent applications even though he was not a member of the Florida Bar.¹¹¹ The record revealed that of the 73 patent practitioners in Florida at the time, 62 were not members of the Florida Bar.¹¹² The record established that Mr. Sperry prepared legal documents, rendered opinions as to patentability, and filed applications in the United States Patent Office. The Florida Bar contended that these actions constituted the unauthorized practice of law. In an unanimous decision, the Supreme Court held that the state was preempted from interfering with the agent's practice, including the part of the practice in Florida which was incidental to the preparation and prosecution of patent applications before the Patent Office.¹¹³ This was a result of the Court's longstand-

(holding those desiring to practice in state as federal tax counsel are required to qualify). For a discussion of state efforts to bar practice before federal agencies, see Rose, *supra* note 2; Simonelli, *State Regulation of a Federal License to Practice Law: Unauthorized Practice or Federal Supremacy*, 31 FED. BAR NEWS & J. 128 (1984); and Comment, *supra* note 79.

109. 373 U.S. 379 (1963).

110. 37 C.F.R. § 1.341 (1951).

111. 373 U.S. at 381. The patent agent had also once advertised himself as a "patent attorney," but had ceased to do so and the issue of whether he could call himself a patent attorney rather than patent agent was not before the Court. Subsequently, United States Patent Office rules have made it clear that nonlawyers may not advertise themselves to be attorneys.

112. *Id.* at 401 n.44.

113. *Id.* at 404.

ing interpretation of the Constitution's Supremacy Clause, which held that state laws must yield when incompatible with lawful federal legislation.¹¹⁴ The Supreme Court found that the Patent Commissioner's action in issuing regulations and establishing a register under the general authority of the federal statute constituted preemptive action by the federal government. Moreover, the *Sperry* opinion implies that even in the absence of a congressional statute expressly authorizing nonlawyer practice, an agency has discretionary authority to permit that practice so long as it is not prohibited by Congress. *Sperry* does not expressly discuss the doctrine of implied authority or the inherent powers of agencies. It does, however, refer specifically to the historical practice of federal agencies to govern the conduct of practitioners and the legislative history of the Administrative Procedure Act in which Congress evidenced its intention not to interfere with this longstanding practice.¹¹⁵

The Supreme Court did not attempt in *Sperry* to delineate the outer limits of the federal government's authority to allow federal agency practice in the several states, noting in a footnote that it was not necessary to do so in the case before it.¹¹⁶ Nonetheless, the Court made it quite clear in the text of its opinion that the federal authority could not be as narrowly circumscribed as the Florida Bar contended and that there are some activities incidental to federal agency practice that are "inevitable." Thus, the Court stated that preparation and prosecution of patent applications:

inevitably requires the practitioner to consider and advise his clients as to the patentability of inventions under the statutory criteria . . . as well as to consider the advisability of relying upon alternative forms of protection which may be available under state law. It also involves his participation in the drafting of the specifications and claims of the patent application . . . (one of the most difficult legal instruments to draw with accuracy). . . . And upon rejection of the application, the practitioner may also assist in the preparation of amendments . . . which frequently requires written argument to establish the patentability of the claimed invention under the applicable rules of law and in light of the prior art.¹¹⁷

The Court found these kinds of activities were inevitable in carrying out federal practice, even though under state law those same activities

114. *Id.* at 384. The *Sperry* Court based its holding on the Supreme Court's former seminal Supremacy Clause ruling in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 211 (1824).

115. 373 U.S. at 396-400.

116. *Id.* at 402 n.47.

117. *Id.* at 383 (citation omitted) (emphasis added). The Florida court's injunction had permanently enjoined *Sperry* from "rendering legal opinions, including opinions as to patentability . . . preparing, drafting and construing legal documents . . . holding himself out in this state, as qualified to prepare and prosecute applications for letters patent . . ." *Id.* at 382.

“constitute the practice of law” and “in the absence of federal legislation, [the state] could validly prohibit nonlawyers from engaging in this . . . practice.”¹¹⁸ As noted above, the Court declined to delineate the outer limits of the federal government’s preemptive authority. Nonetheless, the Court in a footnote stated:

We note, however, that a practitioner authorized to prepare patent applications must *of course* render opinions as to the patentability of the inventions brought to him, and that it is entirely reasonable for a practitioner to hold himself out as qualified to perform his specialized work, so long as he does not misrepresent the scope of his license.¹¹⁹

Finally, the Court rejected the Florida Bar’s contention that the federal authority extended only to activities performed on federal property or in the District of Columbia. The Court explained “[t]he bulk of practitioners are now scattered throughout the country” and “if practitioners were not so located, and thus could not so easily consult with the inventors with whom they deal, their effectiveness would often be considerably impaired.”¹²⁰

The Court’s decision in *Sperry* does not give federal agency practitioners a license to practice law generally. Patent agents, for example, are clearly not authorized to draw up wills and trust instruments. In fact, the Court expressly stated that a state “maintains control over the practice of law within its borders except to the limited extent necessary for the accomplishment of the federal objectives.”¹²¹ The overall thrust of the Court’s decision and the language of its opinion make clear, however, that the “limited extent necessary for the accomplishment of federal objectives” cannot be too narrowly circumscribed by the state. The Court’s opinion explains that federal agency practice “of course” and even “inevitably” encompasses reasonable advertising, advice, analysis of applicable federal laws and comparable alternative state laws, preparation of legal documents, and conduct of appeals, including written argument.¹²²

118. *Id.* at 383.

119. *Id.* at 402 n.47 (emphasis added).

120. *Id.* at 389-90.

121. *Id.* at 402.

122. *Id.* at 383. Some commentators have focused on the *Sperry* Court’s phrase “limited extent necessary for the accomplishment of the federal objective” and concluded that the activities necessary to carry out the federal agency’s objectives may themselves be “limited” by the state unless the federal agency expressly authorizes a broad range of activity. Rose, *supra* note 2; Simonelli, *supra* note 108. This focus and conclusion is probably too narrow and stringent, however, since the Court’s opinion as a whole makes it clear that so long as the federal agency practice itself is generally authorized by the agency, there is a broad range of protected activity which is inevitably necessary and incidental to carry out that practice. Moreover, the *Sperry* Court plainly

It is important to point out that it was not congressional enactment of the Patent Act that brought about the federal preemption decision in *Sperry*. Rather, it was the Patent Office's issuance of regulations and the establishment of a register under the general authority of the Patent Act that constituted the preemptive action.¹²³ Similarly, section 555(b) of the Administrative Procedure Act authorizing nonlawyer representation, which is not substantively dissimilar to the Patent Act provision at issue in *Sperry*, does not itself preempt state regulatory action; rather, it is dependent upon agency implementation.

In addition to the Patent Office, a number of other federal agencies have clearly acted to preempt state regulation of nonlawyers. The Internal Revenue Service, the National Labor Relations Board, and the Interstate Commerce Commission were among the early examples of agencies which issued regulations, established rosters, and took other action to recognize lay practitioners.¹²⁴ In general, where the federal government has clearly provided for lay representation, state courts in recent years have increasingly allowed the representation under the preemption analysis in *Sperry*. In addition, where an agency has issued unambiguous regulations authorizing lay practice before it, the courts have, subsequent to *Sperry*, taken a broadened view of what activity is "incidental" to federal agency representation.¹²⁵ Finally, as some federally endorsed lay activities have in recent decades become the livelihood of large numbers of laypersons, the courts and the state bars have relaxed their earlier hostility to these activities.

It must be stressed, however, that where a federal agency has *not* clearly acted to preempt, state courts may continue to prohibit lay assistance to persons involved in the agency's proceedings. This is illustrated by the recent case of *State Bar of Texas v. Cortez*.¹²⁶ Defendants advertised that they had 35 years of experience in immigration matters and offered to provide services to Hispanics seeking assistance

authorized this broad range of activity, even though it recognized that the same activity, absent the federal authorization, could under state law constitute the "practice of law." Notwithstanding this broadened reading of *Sperry*, it may well be prudent for federal agencies to spell out in some detail the extent of authorized activities in view of the continuing vigor of state unauthorized practice laws and the continuing concern of laypersons over prosecution.

123. The Patent Act provision at issue in *Sperry*, 35 U.S.C. § 31 (1982), merely empowered the Patent Office to issue regulations governing the admission and conduct of lay representatives before it.

124. An extensive list of federal agency regulations permitting lay practice, and court decisions and articles concerning those regulations is set forth in Rose, *supra* note 2.

125. *Id.*

126. 692 S.W.2d 47 (Tex. 1985), *cert. denied*, 106 S. Ct 384 (1985).

before the Immigration and Naturalization Service. The record revealed that defendants' most common activity was the selection and completion of the I-130 Form (petition to classify status of alien relative for issuance of immigrant visa) by interviewing persons and explaining the instructions provided by the INS.¹²⁷ They also completed several other forms less frequently required, such as applications for citizenship. Defendants also assisted in gathering and storing supporting documentation and preparing the alien for his or her embassy interview. Defendants charged a fee for their services, usually \$400. The Texas Supreme Court affirmed the decision of the trial court enjoining defendants from continuing their business on the ground that their acts constituted the unauthorized practice of law.¹²⁸ The decision emphasized that the assistance required special legal skills, including which forms, if any, should be filed and what information would enable the alien to obtain a visa and not be subject to deportation.¹²⁹

A similar case arose in 1984 in North Carolina involving a client of Public Citizen, a public interest law firm. The client, Frances Lane, was a former nonlawyer employee of the Immigration and Naturalization Service who wished to provide services, similar to those provided in *Cortez*, for modest fees. The State Bar's Unauthorized Practice Committee threatened to prosecute her for unauthorized practice.¹³⁰ Subsequently, following Ms. Lane's retention of counsel, the State Bar entered into a settlement agreement allowing her to conduct her immigration practice so long as her advertising deleted any reference to paralegal services or immigration law.¹³¹

One could reasonably assume that filling out routine adjustment of status and citizenship forms for the Immigration and Naturalization Service should not be subject to state unauthorized practice prosecution in Texas any more than is the preparation of patent applications in

127. *Id.* at 48. This is the form most commonly filled out by laypersons employed by nonprofit agencies assisting aliens. AYUDA, for example, reported that approximately 80% of its immigration caseload involved preparation of this and similar forms. Interview with Yolanda Vega, Executive Director, AYUDA, Washington, D.C.

128. 692 S.W.2d at 51.

129. *Id.* at 50. Similar holdings that preparation of immigration forms requires legal training and skills were handed down by the Florida Supreme Court in *Florida Bar v. Moreno-Santana*, 322 So. 2d 13, 15-16 (Fla. 1975), and *Florida Bar v. Rureta-Cabrera*, 322 So. 2d 28, 29 (Fla. 1975).

130. Comments of Alan Morrison, Executive Director, Public Citizen, at a meeting of the Committee on Regulation of the Administrative Conference of the United States (Sept. 7, 1984) (nonverbatim minutes).

131. Letter from Frances Lane to Public Citizen (July 9, 1984). Typically, investigations of unauthorized practice, and their resulting prosecutions or settlements, are unpublished.

Florida, which was upheld by the Supreme Court in *Sperry*. Both *Sperry* and *Cortez* involved similar activities: (1) preparation of papers for submission to a federal agency on the basis of an understanding of a discrete body of federal rules and how those rules applied to the facts presented by clients; (2) giving advice to clients regarding the applicability of federal rules to particular fact situations, the patentability of an invention in one case and the adjustment of status in another, both of which may involve advice as to which of several alternatives to follow; (3) conduct of activities in offices in the states where they lived, rather than in the District of Columbia or in a federal facility; (4) imposition of fees for services rendered, the amounts of which were not characterized in either case as grossly excessive; and (5) advertisement of availability to provide the services in question. There was no question raised in either case of any special competence to perform the activities in question other than the charge by the state bar committees that the persons were not trained to be lawyers. In the North Carolina case, the defendant was formerly an employee in good standing of the Immigration and Naturalization Service.

The principal reason for the treatment of the lay practitioner in *Cortez* differing from that accorded the patent agent in *Sperry* is that the Immigration and Naturalization Service has not implemented its authority under section 555(b) of the Administrative Procedure Act to authorize nonlawyers to provide assistance in routine immigration matters for fee. Under INS regulations, nonlawyers may provide repeat representation only if they are employed by nonprofit organizations which provide free services to indigents or other persons eligible for their assistance.¹³² The provision of assistance for fee is restricted to lawyers.¹³³ There is no limit on the fees that a lawyer may charge, and unlike fee awards in Social Security disability cases, the fees are not subject to agency approval.

In accordance with the Administrative Practice Act,¹³⁴ any lawyer may be admitted to practice before the Immigration and Naturalization Service without application to any special examination or other competence criteria. Conversely, the INS imposes strict competence criteria and admission requirements on nonlawyers who are employed

132. 8 C.F.R. § 292.1 (1987). A nonlawyer is also permitted under INS regulations to appear on a one-time basis, without fee, on behalf of a relative, friend, or other person with whom there is a personal relationship.

133. Lawyers practicing before the Immigration and Naturalization Service have argued that nonlawyers should be barred from agency practice in all matters, whether or not a fee is charged.

134. 5 U.S.C. § 500 (1982).

by nonprofit agencies providing free assistance, primarily to indigents.¹³⁵

Yvonne Vega, the current director of AYUDA, a nonprofit organization accredited by INS, reports that she received certification from the INS to provide lay representation in INS proceedings several years ago when she was employed as a member of AYUDA's staff. She was required to show employment by AYUDA and to submit letters of recommendation and other evidence as to her knowledge of INS rules, experience with INS matters, and good character. In addition, she was personally interviewed by an officer of the INS, and additional INS agents interviewed her neighbors and friends concerning her character. Notwithstanding this rather rigorous certification procedure, Ms. Vega reports that when she left the nonprofit agency for a period of time, she lost her certification because she was no longer employed by a nonprofit organization. Thus, she was not permitted to charge fees for her services in the open market. She then went to work for a lawyer specializing in immigration matters and performed work on his cases for which he charged clients the usual legal fees. Now that she has returned to AYUDA as its director, she is once again eligible to be certified.¹³⁶

Similarly, Frances Lane, the North Carolina layperson discussed earlier, who desired to provide assistance in routine immigration matters for a modest \$100 fee, was an employee in good standing of the Immigration and Naturalization Service before her retirement. Notwithstanding her acknowledged experience and competence, she is not authorized to charge fees for her services under current INS regulations and, as a result, is faced with prosecution under the law of many states if she attempts to do so. The INS regulations contrast sharply with those of the Internal Revenue Service, which automatically permits former nonlawyer IRS agents who have completed six years of

135. 8 C.F.R. § 292.2(d) (1987).

136. Interview with Yvonne Vega, Executive Director, AYUDA, Washington, D.C. Ms. Vega noted that while her personal interview focused on her good character, other lay employees of nonprofit agencies have been examined as to their knowledge of INS rules.

At the time Ms. Vega applied for certification, the certification procedure was handled by the various district offices of INS located throughout the country, although final approval was given by the Board of Immigration Appeals (BIA) in Washington, D.C. In December 1984, the BIA revised its procedures and provided that applicants for certification should apply directly to BIA. Certification is now largely granted on the basis of written documentation as to knowledge, experience, and good character, although the district offices may still conduct an investigation as they deem appropriate. District offices have 30 days in which to recommend approval of the application to the BIA. 8 C.F.R. § 292.2(b) (1987); Interviews with INS officials Sanchez and Hurwitz, *supra* note 32.

IRS employment to provide representation before the Service at all levels.

From the perspective of would-be nonlawyer practitioners, the *Cortez* and *Lane* cases are not isolated incidents in a climate otherwise favorable to nonlawyer practice before federal mass justice agencies. Quite to the contrary, interviews reveal that they appear to be only the latest examples of a confusion in application of state unauthorized practice laws to federal agency practice, and an ongoing antagonism to nonlawyer practice generally.¹³⁷ Significantly, nonlawyer professionals who were interviewed did not perceive clear signals from federal mass justice agencies that nonlawyer representation for fees is encouraged. Interviewees observed that nonlawyer representation is encouraged by the federal government only if it is made available free of charge to the indigent who cannot afford fees.

Interviewees noted, for example, that federally funded legal aid organizations are generally barred from taking a fee-generating case unless the person first attempts to find legal assistance from the private bar and no lawyer in private practice can be found who is willing to handle the matter.¹³⁸ Furthermore, interviewees noted that federally subsidized legal aid organizations are not required to ascertain the availability of nonlawyer practitioners.

Those interviewed pointed to the fact that INS regulations allow nonlawyer representation only when no fees are charged. In November 1984, INS revised its rules relating to the accreditation of nonprofit agencies and certification of nonlawyers working for those agencies, but failed to provide for nonlawyer assistance for a fee.¹³⁹ This may have been an oversight on the part of the INS, but may also have resulted from the opposition by lawyers to nonlawyer practice. The summary to the INS final rules notes that it received largely favorable public response to the proposed rules, but "drew the most severe criticism" from

137. It is difficult to obtain detailed information concerning the extent to which nonlawyer professionals are required or pressured, directly or indirectly, to cease activities which state bars consider to be unauthorized practice. A survey of state bar unauthorized practice enforcement committees revealed that 80% of the 1,669 complaints processed by them nationwide during 1980 resulted in informal, unpublished agreements, and that nearly 5% of their cases which terminated in judicial findings of unauthorized practice were unreported. Only three judicial decisions concerning unauthorized practice were published in the nation during 1979 and only three more in 1980. Rhode, *supra* note 96.

138. Interview with Willie Cook, Executive Director, Neighborhood Legal Services Program; Interview with Leslie Long O'Leary, Pro Bono Coordinator, District of Columbia Bar. Legal service programs are allowed, however, to handle Social Security claims of eligible clients.

139. 49 Fed. Reg. 44,086 (1984) (codified at 8 C.F.R. § 292.2).

those "who expressed the view that the growing complexity of immigration . . . law and procedure necessitated the elimination of nonattorneys in this area altogether."¹⁴⁰

Nonlawyer professionals providing assistance in Social Security disability cases as employees of nonprofit organizations noted that Social Security Administration regulations permit nonlawyer representation.¹⁴¹ The regulations do not, however, stress that nonlawyer representatives may hold themselves out in the states as Social Security agents and charge fees in the marketplace for their services. Moreover, while the enabling legislation for Social Security benefit claims provides that attorneys' fees may be deducted by SSA from a claimant's award and paid directly by the agency to attorneys, there is no similar proviso for nonlawyer representatives.¹⁴²

Even the existence of financial incentives, namely fee awards in Social Security disability cases, has not resulted in a large pool of nonlawyer practitioners for those cases. Social Security Administration personnel estimated that in the 12% of hearing request matters handled solely by SSA personnel, the majority were paralegals working for legal aid and other nonprofit organizations. At the same time, the availability of fee awards in disability cases has contributed to a dramatic increase in lawyer representation from 36.8% in 1977 to 64.2% in 1983.¹⁴³

Thus, notwithstanding the fact that lay representation is permitted by the Social Security Administration, and lay practitioners may even receive awards, there has not developed any visible, readily identifiable cadre of Social Security disability representatives or agents. No descriptive word even exists in popular parlance to describe such persons akin to the description of patent agents who practice before the Patent Office or enrolled agents who practice before the Internal Revenue Service. Moreover, there are no readily identifiable organizations of such persons.

The National Organization of Social Security Claimants Representatives (NOSSCR), the largest organization of persons providing representation in Social Security Administration proceedings, reports that approximately 400 of its 2,400 members are nonlawyers but that virtually all of them are paralegals employed by legal aid and other non-

140. 49 Fed. Reg. 44,086 (1984).

141. 20 C.F.R. § 404.1700 (1987).

142. 42 U.S.C. § 406(a) (1982).

143. The growth of legal service programs to assist indigents has also helped to increase both lawyer and nonlawyer representation.

profit organizations.¹⁴⁴ Although Social Security Administration personnel stated that they were aware of a handful of nonlawyer practitioners in the Social Security field who were not employed by nonprofit organizations, these practitioners were not on any agency roster or referral list. Thus, these nonlawyer practitioners' names and addresses could not be made available by the SSA either to this author or to claimants seeking assistance. NOSSCR maintains a referral listing for persons needing assistance in Social Security matters, but it is unable to refer fee paying cases to persons other than its lawyer members because it has no listing of nonlawyer practitioners.¹⁴⁵

Similarly, there are no visible and well known neighborhood offices for Social Security representatives akin to the H & R Block and Sears Roebuck offices in the tax practice field. There are neighborhood legal aid and social service agency offices visible in most communities, but their services are ordinarily available only to indigents. These agencies report that they cannot meet all of the needs of indigents.¹⁴⁶ A review of the 50 pages of lawyer advertising in the yellow pages of the District of Columbia telephone book reveals several thousand lawyers' names under specialty headings such as "Social Security matters," but no listings of private nonlawyer practitioners for Social Security matters. Names of lawyers can be obtained from bar association lawyer referral services, but there are no similar referral mechanisms for the working poor or moderate income groups who might desire to employ nonlawyers.

Nonlawyer professionals who were interviewed explained that while training programs in Social Security disability law and other subjects of federal agency practice are offered to nonlawyers by bar associations, law schools, nonprofit organizations, and the federal government, none of these organizations will assign or refer a client to them directly.¹⁴⁷ Rather, cases are assigned to lawyers or to supervising lawyers in nonprofit organizations. Organizations offering the training confirmed this practice and stated that a principal reason for the practice

144. Interview with Staff, National Organization of Social Security Claimants' Representatives.

145. *Id.*

146. DISTRICT OF COLUMBIA JUDICIAL CONFERENCE REPORT, *supra* note 18.

147. Several organizations offering training programs to laypersons in federal agency subjects, such as Social Security and immigration law, were surveyed for purposes of this Article. They included the District of Columbia Bar's Public Service Office; the Department of Legal Counsel for the Elderly, American Association of Retired Persons; the Immigration and Naturalization Service's Voluntary Outreach Program; the George Washington University's Senior Paralegal Institute; Antioch Law School's Paralegal Institute; and the federally funded Neighborhood Legal Services Program.

was the need to protect the program against charges of unauthorized practice. For example, the District of Columbia Bar's public service office confirmed that even though federal law permits nonlawyer representation in Social Security matters, cases coming through the Bar's referral service are always referred to lawyers and never to nonlawyers. The cases may, however, be referred to recent graduates of law schools whose only training in the subject area has been the same training program offered the nonlawyers.¹⁴⁸

Nonprofit agencies surveyed which employ both legal and nonlegal personnel reported that cases are assigned internally to supervising lawyers rather than to the nonlawyer professionals on the staff. These organizations, however, were visibly proud of their nonlawyer staff. Nearly all nonlawyer staff were reported to be college graduates and many had graduate degrees as well. They were reported to have come from a variety of skilled backgrounds and experiences, some having come to the nonprofit agencies upon retirement from previous careers. Some were said to have had backgrounds and experience in Social Security or immigration law before coming to the nonprofit agencies. Notwithstanding these qualifications, staff directors of most service organizations stated that it was the policy of their organizations never to assign cases to nonlawyer professionals on the staff. Although a variety of organizational reasons for exclusive assignment to supervising attorneys were cited by the differing groups, a principal reason cited by nearly every organization was the need to protect its program against charges of unauthorized practice.¹⁴⁹

The directors of the nonprofit organizations reported that they devote an extensive portion of their training sessions and training materials to the subject of state unauthorized practice rules and the need for nonlawyers to comply with them. They also pointed out the extreme

148. Interviews with Leslie Long O'Leary and Ann Barker of the District of Columbia Bar's Public Service Office.

149. The practice of the American Association for Retired Persons' Legal Counsel for the Elderly Department is instructive. It has received one of three grants from the Social Security Administration to conduct training programs in Social Security law for nonlawyer employees of nonprofit organizations throughout the country. The agency has developed extensive training manuals. One of the training manuals in the District of Columbia reviews the District's unauthorized practice laws. It notes that many federal agencies have granted laypersons the right to appear before federal administrative agencies in a representative capacity. The manual concludes, however, with a set off and boldface warning, that "notwithstanding a paralegal's authority to represent a client . . . it is LCE policy that all paralegals must have their work supervised by a staff attorney . . . [in order to] ensure quality legal work and prevent any possible unauthorized practice of law." *Training Materials: What Constitutes the Unauthorized Practice of Law in the District of Columbia?* (Legal Counsel for the Elderly Continuing Legal Education Seminar).

difficulty of teaching nonlawyers how to draw the line between authorized and unauthorized practice when lawyers, courts, and the drafters of model codes have been unable to do so.

Perhaps as a result of the emphasis on unauthorized practice in staff training, the long history of unauthorized practice battles in the states, or a combination of the two, nonlawyer professionals in social service agencies who were interviewed stated that they would be extremely reluctant to open a private Social Security or immigration practice. A principal predominant reason given was fear of state bar unauthorized practice charges.¹⁵⁰

In sum, even when mass justice agency rules allow nonlawyer practice, and when it would appear that the authorized practice is probably protected against state unauthorized practice laws under the federal preemption doctrine, nonlawyer professionals are extremely skittish about getting into the business of mass justice agency representation for fee.¹⁵¹ The nonlawyer's fear of going into the business of mass justice agency representation seems to be due to the cumulative effect of past and ongoing organized bar opposition to nonlawyer practice before federal administrative agencies, the continuing ban on nonlawyer representation in many state administrative agencies, the conflicting decisions from state to state over what constitutes the unauthorized practice of law, the continuing state prosecution of some federal agency practice, the continuing prohibition in many state lawyer codes of ethics against lawyer assistance to laypersons engaged in unauthorized practice, the halfheartedness with which nonlawyer practice is encouraged by some federal agencies, and the continuing general antipathy of many state bars to nonlawyer legal practice generally. All of these factors have created an atmosphere of uncertainty, confusion, and fear on the part of nonlawyer professionals who might otherwise be sources of assistance for the many persons now unrepresented in mass justice agency proceedings.

The results of this empirical study suggest that while the issuance of unambiguous regulations as contemplated by section 555(b) of the Administrative Procedure Act¹⁵² is essential in establishing federal preemption, agency regulations alone may not be sufficient to allay the pervasive fears of would-be lay practitioners. Agencies that wish to encourage increased nonlawyer assistance may have to do more than

150. *Survey of Private Nonprofit Organizations*, *supra* note 3.

151. The business of tax preparation, however, is an exception. After successfully defending themselves against unauthorized practice charges, tax preparers have now become well established throughout the country and accepted by state bars.

152. 5 U.S.C. § 555(b) (1982).

merely issue regulations; they may have to take such measures as certifying nonlawyer practitioners, creating rosters and referral lists, and announcing clearly the incidental activity to be encompassed in the authorized nonlawyer professional practice.

In addition, although it is likely that agencies have implied authority to admit nonlawyers to practice before them, and although it is probable that even if they do not have implied authority section 555(b) of the APA authorizes agencies to admit nonlawyers, it may be useful to amend the language of section 555(b) itself to expressly provide that such agency action is authorized. Further, it may be helpful to amend section 555(b) to make it clear that those admitted to practice before federal agencies are authorized to do all that is incidental and necessary to that representation in their respective states. Incidental and necessary activity would include advertisement, giving advice as to applicable federal rules, preparing relevant documents, and charging fees. In its unanimous *Sperry* decision, the Supreme Court opined that these activities are an "inevitable" part of federal agency practice.¹⁵³

V. FEDERAL MASS JUSTICE AGENCY AUTHORIZATION FOR
INCREASED NONLAWYER PROFESSIONAL ASSISTANCE CAN BE
ACCOMPLISHED IN A MANNER THAT IS CONSISTENT WITH AGENCY
NEEDS TO REGULATE COMPETENCE AND ETHICAL CONDUCT OF
PRACTITIONERS

Federal agency rules and practice which, directly or indirectly, limit the supply of nonlawyer representatives are largely grounded in notions that some or all of the persons affected by the agency's proceedings will be subject to exploitation and harm by incompetent or unscrupulous persons acting as their representatives.¹⁵⁴ This survey found that there was uniform agreement, both within and without government, that there are indeed unscrupulous persons who take advantage of some mass justice agency participants, particularly the non-English speaking, the physically and mentally disabled, the uneducated, and other vulnerable persons. Those interviewed had legions of horror stories about so-called immigration experts or Social Security experts who were completely without knowledge of INS or Social Security rules and who succeeded in obtaining wedding rings, lifetime savings, and other valuables or assets from vulnerable persons on the promise that they would get a

153. 373 U.S. 379 (1963).

154. Similarly, protective notions are usually relied on by state courts in upholding state unauthorized practice laws. See sources cited *supra* note 96 (providing critical analysis of these decisions).

“green card” or disability payments for life.

The horror stories were not, however, limited to nonlawyers. Complaints against unscrupulous lawyers were also frequently cited as a major problem, particularly complaints of fee gouging. A 1985 *Time* magazine article highlighted the problem of exploitation of immigrants by both lawyers and nonlawyers. It reported that five lawyers had been convicted or sentenced in the preceding year on charges stemming from immigration violations.¹⁵⁵ It also reported that “INS officials are among the critics [of lawyers]: they estimate that 30% of permanent resident petitions are fraudulent with corrupt or incompetent lawyers often to blame.”¹⁵⁶ By contrast, INS officials interviewed for this Article could recall only two instances in the past two years in which nonlawyers accredited by the Service had been the subjects of investigation for unethical conduct or incompetent representation.¹⁵⁷ In sum, while mass justice agencies are justified in enacting regulations to control the conduct of practitioners in order to prevent abuse of the public, there is no evidence that those regulations need to be materially different for nonlawyers than they are for lawyers.

The problem of protecting the public from unscrupulous lay practitioners is not a new one for federal agencies. Past history demonstrates that the remedy need not be disqualification of all nonlawyers. For example, the problem of unscrupulous nonlawyer patent agents at one time became a national scandal and led to several Patent Office reforms. As the Supreme Court noted in its *Sperry* decision:

Despite the early recognition of nonlawyers by the Patent Office, these agents, not subject to the professional restraints of their lawyer brethren, were particularly responsible for the deceptive advertising and victimization of inventors which long plagued the Patent Office.¹⁵⁸

What is instructive about the Patent Office experience is that even though the great bulk of complaints of misconduct involved nonlawyer patent agents, the Patent Office did not disqualify all nonlawyers as a group. Rather, it tailored reform toward good moral conduct requirements and patent examinations which could be complied with by both lawyers and nonlawyers. The Patent Office system has been widely lauded as highly workable, and one which has successfully rooted out incompetent and unscrupulous patent agents without broadly disquali-

155. Sennill, *A Booming but Tainted Specialty*, TIME, July 8, 1985, at 77.

156. *Id.* at 77.

157. Interviews with Y. Sanchez and J. Hurwitz, *supra* note 32. The INS does not maintain statistical data on numbers of complaints or numbers of persons disbarred from agency practice or otherwise disciplined.

158. 373 U.S. at 390.

ifying a whole class of persons:

So successful have the efforts of the Patent Office been that the Office was able to inform the Hoover Commission that "there is no significant difference between lawyers and nonlawyers either with respect to their ability to handle the work or with respect to their ethical conduct."¹⁵⁹

Moreover, the Patent Office has succeeded notwithstanding the fact that a patent application is, in the words of two Supreme Court decisions, "one of the most difficult legal instruments to draw with accuracy"¹⁶⁰ and "frequently requires written argument . . . under the applicable rules of law."¹⁶¹

Similarly, other studies have disclosed that federal agencies that admit nonlawyers to practice generally have not found unethical conduct of nonlawyers to be a greater problem than that posed by unethical lawyers. Neither have these agencies found the problem of regulating nonlawyer conduct to be greater than regulating lawyer conduct. This was the conclusion of the American Bar Association Committee's survey of 37 federal agencies, and it was the conclusion reached by Professor Rose on the basis of his interviews with federal agencies in the economic regulatory area.¹⁶²

There are, of course, fundamental ethical requirements which agencies should impose on both lawyers and nonlawyers. Agencies are likely to have such requirements already in place, at least for lawyers. Provisions barring conflicts of interest or criminal activity, for example, are universal. Other provisions barring gross negligence, or fee gouging, may or may not be promulgated by various agencies, but it would seem that they should apply with equal force to lawyers and nonlawyers. These activities, and similar unethical conduct, are barred in the American Bar Association's model codes of lawyer conduct, which have been adopted by nearly all federal agencies for the purpose of regulating the ethical conduct of lawyers.

The issue of nonlawyer competence can be treated simply as an ethi-

159. *Id.* at 402.

160. *Topliff v. Topliff*, 145 U.S. 156, 171 (1892).

161. 373 U.S. at 383.

162. Rose, *supra* note 2, at 58-69. For example, Professor Rose's interviews with Interstate Commerce Commission officials revealed that there had been no major disciplinary problems with nonlawyer practitioners in 15 years. Only in the Internal Revenue Service were there a substantial number of disciplined nonlawyers. The Office of Practice reported that it had imposed discipline against nonlawyers in approximately two-thirds of the 360 discipline cases arising in the five-year period between 1978 and 1983. However, these numbers were not viewed by IRS officials with alarm in light of the extremely large numbers of nonlawyers authorized to practice before the IRS.

cal matter.¹⁶³ Federal agencies can also, however, employ a wide range of additional methods to ensure that nonlawyer practitioners meet agency standards of competence. The Patent Office's administration of an examination to potential patent agents, discussed above, is an example. A similar examination system is employed by the Internal Revenue Service, although it is used only for certain categories of representatives. As noted earlier, the IRS system allows representation to a limited extent by minimally trained H & R Block-type personnel, who are not subject to examination, as well as representation in all matters by former IRS agents, certified public accountants, and lawyers, who also are not subject to examination. Lawyers and certified public accountants are presumed by virtue of their training to be qualified and are authorized under the Attorney Practice Act¹⁶⁴ to provide representation. Finally, the IRS permits representation of the general public in all matters by nonlawyer "enrolled agents" who must pass stiff examinations and meet continuing legal education requirements.¹⁶⁵ Ethical restrictions against conflicts of interest, fraud, misrepresentation, and other malfeasance are enforced against both lawyers and nonlawyers through the Service's disciplinary machinery. The IRS retains the ultimate authority to disbar or otherwise discipline both lawyers and nonlawyers.

Similar to the IRS, the Immigration and Naturalization Service employs a multi-tiered approach to assuring competence among those representatives who do not charge fees.¹⁶⁶ As noted earlier in this study, nonlawyers, no matter how competent or experienced, are not authorized under INS rules to provide representation if they charge fees. Nonlawyer friends, clergy, and neighbors appearing on a one-time basis without fee are not subject to any special competence or experience requirements. Nonprofit organizations assisting the general public, however, must be recognized by the Board of Immigration Appeals, and individual employees of nonprofit organizations must be accredited before they are permitted to appear in representational capacities.¹⁶⁷

163. Most federal agencies have adopted the American Bar Association's ethical rules. These rules prohibit incompetence and the assumption of tasks beyond one's capability without assistance of someone else who is more skilled. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 6-101 (1980); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1983).

164. 5 U.S.C. § 500 (1982).

165. See *supra* note 59 (discussing requirements for agents).

166. 8 C.F.R. § 292 (1987).

167. The Veterans' Administration also requires that nonprofit organizations desiring to provide representation to the general public in VA proceedings be recognized by the VA.

Nonprofit organization employees who are partially accredited, but who do not yet satisfy all the INS training and experience criteria, are able to assist individuals in filling out forms but not to appear as representatives in INS proceedings. To be fully accredited, an individual employee of a nonprofit organization must satisfy experience criteria as well as good moral conduct standards.

Other agencies, such as the Social Security Administration, historically have not found it necessary to require nonlawyer representatives to pass examinations, complete continuing legal education courses, or satisfy past experience or other competence criteria.¹⁶⁸ SSA officials reported, however, that it is considering the adoption of stricter measures than now exist to protect the public, including a procedure by which SSA claimants can complain to it about their representatives. SSA officials pointed out that they have some control over competence of practitioners in that attorney and agent fees must, by statute, be approved by the SSA in Social Security disability proceedings and in some other benefits cases.

Federal agencies employ a variety of mechanisms to ensure competent representation by practitioners. This study has concluded that there is no reason that competence criteria should be uniform throughout the government, since each agency has its own particular substantive and procedural rules to administer, differing skill needs to carry out the varied agency mandates, as well as differing cost benefit and other administrative issues to consider. In enacting the Administrative Procedure Act, Congress clearly authorized federal agencies to continue the then-existing procedure of imposing varied practice criteria according to the particular needs of the respective agencies. This determination was reaffirmed in 1965 at the time of enactment of the Attorney Practice Act.

Finally, this study has ascertained that enforcement of both competence standards and ethical conduct standards varies from agency to agency in the mass justice area as it does in other areas. The Office of Practice in the Internal Revenue Service, for example, has an active program of enforcement. On the other hand, while the Social Security Administration maintains ethical standards and retains the authority to discipline and disbar lawyers and nonlawyers, in practice the authority is rarely used. There have been numerous studies and articles on the

168. Some regulatory agencies, for example the National Labor Relations Board, have also historically adopted a laissez-faire approach to practitioner regulation. Rose, *supra* note 2; see also 1985 AMERICAN BAR ASSOCIATION REPORT, *supra* note 30 (discussing lawyer's responsibility for client protection).

subject of inconsistent federal disciplinary rules and the inconsistent, and sometimes lax, enforcement thereof. As one federal court wrote over 30 years ago, "probably no subject has received more continuing effort, so far without success, to accomplish by legislative enactment some uniformity and desirable standards of admission and disciplinary action than has this problem of practice before administrative agencies."¹⁶⁹

Although the issue of automatic admission of lawyers to practice before federal agencies has been resolved in the intervening years with the passage of the Attorney Practice Act, the issue of inconsistent enforcement of discipline remains. Notwithstanding repeated efforts by bar groups to remove lawyer discipline from agencies and place it with state bar disciplinary entities, Congress has continued to allow federal agencies to exercise discretion in practitioner discipline for both lawyers and nonlawyers. The Administrative Conference of the United States considered the issue in 1982 and concluded that any problems concerning inconsistent attorney discipline before federal agencies were not of such a magnitude as to require changing the statutory authorization or requiring the adoption of uniform federal standards.¹⁷⁰

It is not the purpose of this Article to revisit the long-lived controversy over federal agency enforcement of practice rules. Nor is it necessary to resolve the problems of inconsistent discipline by federal agencies in order to address the discrete issue of whether mass justice agencies should be urged to admit more nonlawyers to practice. This survey has found that agency officials do not believe that disciplinary problems caused by nonlawyers are significantly greater than those caused by lawyers. Further, the experience of the IRS has shown that enforcement of good conduct rules against nonlawyers is a manageable task, even when large numbers of nonlawyers are admitted to practice. Consequently, this Article concludes that the potential need to discipline errant nonlawyers should not deter mass justice agencies from encouraging increased nonlawyer representation. This is not to say, however, that agencies should have no rules governing the ethical conduct of nonlawyers. To the contrary, in order to protect the public, agencies should make applicable to nonlawyers the existing rules dealing with lawyer malfeasance, such as negligence, fee gouging, fraud, misrepresentation, and conflicts of interest. Moreover, agencies should

169. *Camp v. Herzog*, 104 F. Supp. 134, 138 (D.D.C. 1952). A more recent discussion of the problem appears in Best, *Shortcomings of Administrative Agency Lawyer Discipline*, 31 EMORY L.J. 535 (1982).

170. 1 C.F.R. § 310.8 (1987).

ensure that effective procedures are established for adequate enforcement of those rules of practice, including procedures whereby the adversely affected public can complain about misconduct of nonlawyers admitted to practice before the agencies.

CONCLUSION

This study has determined that a large number of individuals in mass justice agency proceedings are unrepresented and that a source of assistance, which has not been fully tapped, exists in a pool of skilled nonlawyer professionals. Guidance to mass justice agencies on the subject of nonlawyer practice would be useful. Such guidance should encourage agencies to review their regulations and policies with the twin goals of increasing representation and maximizing free choice among representatives, whenever feasible.

This study has further ascertained that in some federal mass justice agencies, nonlawyer representation has not been particularly encouraged by agency rules and policies, and in some instances it has been discouraged. This has deterred nonlawyer professionals from seeking to establish federal agency practices because they believe they will be subject to prosecution under state laws prohibiting the unauthorized practice of law. A further conclusion is that because the problem of unauthorized practice of law is so pervasive, and because federal agency regulations must unambiguously preempt state laws to provide protection to nonlawyer practitioners, mass justice agencies should be urged to declare unambiguously their intention to preempt. This should be done with respect to representation during agency proceedings and with respect to all activity incidental to that representation which may be performed in the states. In so doing, the agencies should, of course, consult and coordinate with states and other interested parties before adopting final regulations in accordance with the recommendations on preemption promulgated by the Administrative Conference.¹⁷¹

Mass justice agencies should be further encouraged to tailor their admission criteria narrowly so that particular issues of competence in agency proceedings are addressed without overly broad disqualification of the entire class of nonlawyers (or specifically of nonlawyers who charge fees). Given the evidence that skills vary more from individual to individual than from the class of lawyers to the class of nonlawyers, those agencies that desire to impose competence requirements should

171. Administrative Conference Recommendation No. 84-5, Preemption of State Regulation by Federal Agencies, 1 C.F.R. § 305.84-5 (1987).

be encouraged to focus on the particular functions to be performed at varying levels of agency proceeding. Further, agencies can focus on the particular skills, training, and experience needed to perform competently those particular functions. The Internal Revenue Service is a good model in this regard, as is the Immigration and Naturalization Service's partial and full accreditation scheme for employees of non-profit organizations. In this respect, agencies should determine carefully, and narrowly, whether there are proceedings of a trial-type nature that are so highly specialized that it is essential to mandate representation only by those who are trained trial lawyers.

Finally, mass justice agencies should review their rules of practice that deal with attorney misconduct to ensure that similar rules are made applicable to nonlawyers. Agencies should also ensure that effective agency procedures are established for adequate enforcement of rules of practice, including procedures for receiving complaints from the adversely affected public.¹⁷²

172. The Administrative Conference of the United States has adopted formal recommendations pursuant to the findings in this study:

(1) The Social Security Administration, the Immigration and Naturalization Service, the Veterans Administration, the Internal Revenue Service, and other Federal agencies that deal with a significant number of unassisted individuals who have personal, family, or personal business claims or disputes before the agency, should review their regulations regarding assistance and representation. The review should be directed toward the goals of authorizing increased assistance by nonlawyers, and of maximizing the potential for free choice of representative to the fullest extent allowed by law.

(2) If an agency determines that some subject areas or types of its proceedings are so complex or specialized that only specially qualified persons can adequately provide representation, then the agency may need to adopt appropriate measures to ensure that nonlawyers meet specific eligibility criteria at some or all stages of representation. Agencies should tailor any eligibility requirements so as not to exclude nonlawyers (including nonlawyers who charge fees) as a class, if there are nonlawyers who, by reason of their knowledge, experience, training, or other qualification, can adequately provided assistance or representation.

(3) Agencies should declare unambiguously their intention to authorize assistance and representation by nonlawyers meeting agency criteria. Where a declaration by an agency may have the effect of preempting state law (such as "unauthorized practice of law" prohibitions), then the agency should employ the procedures set out in Recommendation 84-5 with regard to notification of and cooperation with the states and other affected groups.

(4) Agencies should review their rules of practice that deal with attorney conduct (such as negligence, fee gouging, fraud, misrepresentation, and representation when there is a conflict of interest) to ensure that similar rules are made applicable to nonlawyers as appropriate, and should establish effective agency procedures for enforcing those rules of practice and for receiving complaints from the affected public.

Administrative Conference Recommendation No. 86-1, Nonlawyer Assistance and Representation, 1 C.F.R. § 305.86-1 (1987).